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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

AT THE OCTOBER TERM, 1896, AND THE MARCH TERM, 1897, OF THE FIRST
DISTRICT; THE MAY AND NOVEMBER TERMS, 1896, OF THE
THIRD DISTRICT, AND THE AUGUST TERM, 1896,
OF THE FOURTH DISTRICT.

VOL. LXIX

REPORTED BY
MARTIN L. NEWELL
OF THE SPRINGFIELD BAR

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THE
APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.

ARBA N. WATERMAN, " " "

HENRY M. SHEPARD, " " "

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

JUSTICES.

LYMAN LACEY, Havana, Mason county.

OLIVER A. HARKER, Carbondale, Jackson county.

JOHN D. CRABTREE, Dixon, Lee county.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield, Sangamon county.

JUSTICES.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.

GEORGE W. WALL, Du Quoin, Perry county.

CARROLL C. BOGGS, Fairfield, Wayne county.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.

CLERK—Frank W. Havill, Mount Vernon, Jefferson county.

JUSTICES.

NATHANIEL W. GREEN, Pekin, Tazewell county.

CHARLES J. SCOFIELD, Carthage, Hancock county.

ALFRED SAMPLE, Paxton, Ford county.

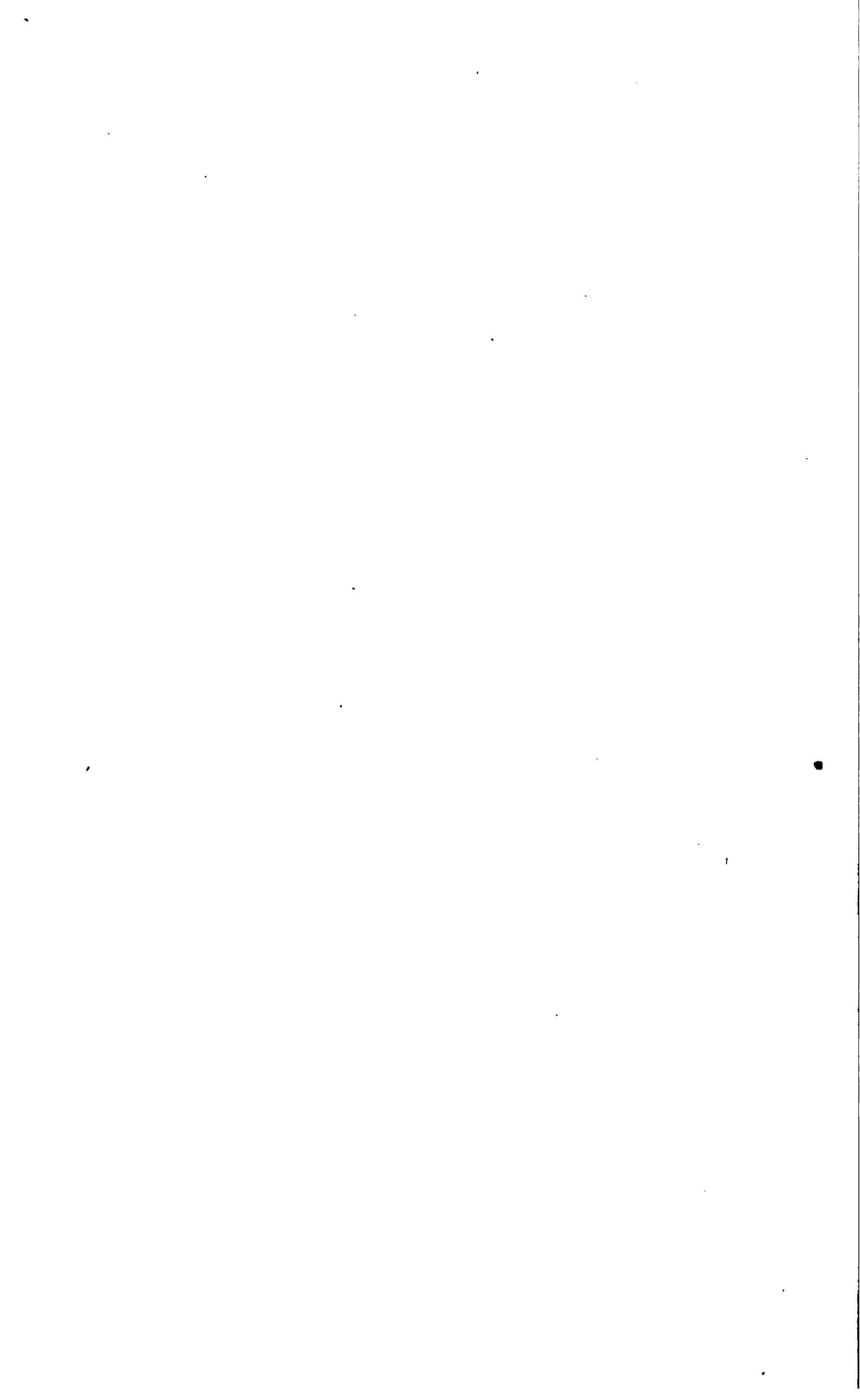


TABLE OF CASES.

A

Auburn Cycle Co. v. Foote.....	644
Adamson ats. South Chicago City Ry. Co.....	110
Allan v. Foreman Brothers.....	58
Allen ats. Schlesinger.....	187
American National Bank v. Western Hay & Grain Co., use, etc...	268

B

Bailey, Coroner, etc., ats. Carlisle Shoe Co.....	349
Baker v. Baker.....	461
Baker v. Clancey.....	85
Baker v. Deane et al.....	618
Baker v. Fawcett et al.....	300
Ball ats. Catholic Press Co.....	591
Ballard v. City of Chicago.....	638
Baltimore & O. S. W. Ry. Co. v. Derr, Adm.....	180
Baltimore & O. S. W. Ry. Co. v. Higgins.....	412
Banks Agricultural & Transfer Co., use, etc., v. Masters.....	578
Barclay v. People, etc.....	517
Bartlett, Adm'r v. Cicero Light, Heat & Power Co.....	576
Bates v. Kaestner et al.....	620
Batson ats. Illinois Central R. R. Co.....	288
Bauchens v. Paulis.....	202
Beckstein v. Gall.....	616
Beattie v. National Bank of Illinois.....	682
Beaty et al. ats. Cheney, Adm'r.....	402
Beaver v. Danville Shirt Co.....	820
Beebe, Adm'x, ats. Illinois Central R. R. Co.....	363
Belleville Pump & Skein Works v. Bender.....	189
Bender ats. Belleville Pump & Skein Works.....	189
Bender ats. Cleveland, C., C. & St. L. Ry. Co. et al.....	262
Besten ats. City of Decatur.....	410
Blackman et al. v. Lewis.....	186
Board of Supervisors v. Commissioners of Highways.....	844, 464
Bohling et al. ats. Eden, Ex'r.....	307
Bolansen ats. Lebkeucher.....	297

Bond v. Pennsylvania Co.....	507
Boughter ats. Brownell	122
Brattleboro Savings Bank ats. Brownell.....	122
Bright v. Kenefick.....	43
Bristol, Adm'x, ats. Metropolitan Accident Ass'n.....	492
Brown et al. ats. Hyde Park Thompson-Houston Light Co.....	582
Brownell v. Brattleboro Savings Bank.....	122
Brownell v. Boughter.....	122
Brownell v. Gray.....	122
Bruse et al. ats. Hollst.....	48
Buck ats. Wilkey.....	179
Buck, Sheriff, v. Mitchell.....	219
Burke et al. ats. Clark.....	540
Bushnell ats. Weber.....	26
Butler ats. Illinois Central R. R. Co.....	128

C

Caldwell et al., Ex'rs, ats. Missionary Society of the M. E. Church.	280
Calumet Electric St. Ry. Co. v. Nolan.....	104
Calumet Stock Farm v. Rockefeller.....	553
Capoot ats. Cleveland, C., C. & St. L. Ry. Co.....	163
Caraker ats. Grieb.....	236
Carlisle Shoe Co. v. Bailey, Coroner, etc.....	349
Carlock ats. Chicago & A. R. R. Co., use, etc.....	498
Carlson ats. Star Elevator Co.....	212
Carter v. Penn.....	420
Case et al. ats. Wright.....	535
Catholic Press Co. v. Ball.....	591
Central Lumber Co. ats. Reynertson.....	181
Challacombe v. McLean, receiver.....	485
Chandler et al. v. Louisville Banking Co.....	604
Cheney, Adm'r, v. Beaty et al.....	402
Chicago & A. R. R. Co., use, etc., v. Carlock.....	498
Chicago & A. R. R. Co., use, etc., v. Hall.....	497
Chicago City Ry. Co. v. Gregg.....	77
Chicago City Ry. Co. ats. Rack.....	656
Chicago City Ry. Co. v. Smith.....	69
Chicago Forge and Bolt Co. v. Rose.....	123
Chicago & Grand Trunk Ry. Co. ats. Luxen.....	648
Chicago & Grand Trunk Ry. Co. v. Spurney.....	549
Chicago & N. W. Ry. Co. v. Hansen.....	17
Chicago, R. I. & P. Ry. Co. et al. ats. Payne.....	38
Chicago & W. I. R. R. Co. et al. v. Reichert.....	91
Choisser v. Young, receiver.....	252
Cicero Light, Heat and Power Co. ats. Bartlett.....	576
Cipher v. McFall & Whittington.....	228
City Electric Ry. Co. ats. Hill.....	441
City of Alton v. English.....	197
City of Chicago ats. Ballard.....	638

TABLE OF CASES.

9

City of Chicago ats. Kiel.	685
City of Chicago ats. Moore.	571
City of Chicago v. Sperbeck.	562
City of Danville ats. English.	288
City of Decatur v. Besten.	410
City of East St. Louis v. Flannigan.	167
City of Mt. Pulaski et al. ats. Snyder.	474
City of Springfield v. Coe.	277
Clancey ats. Baker.	85
Clark v. Burke et al.	540
Cleveland, C., C. & St. L. Ry, Co. et al. v. Bender.	262
Cleveland, C., C. & St. L. Ry. Co. v. Capoot.	163
Cleveland, C., C. & St. L. Ry. Co. v. Patterson.	438
Collins v. Manville.	594
Coe ats. City of Springfield.	277
Colby Bros. & Co. ats. LaForge et al.	443
Commissioners of Highways ats. Board of Supervisors.	844, 464
Commissioners of Highways, etc. v. People ex rel. etc.	826
Conroy et al v. Townsend.	61
Consolidated Coal Co. v. Rainey.	182
Continental Investment & Loan Society v. McKay.	72
Cornell ats. Weill.	60
Cox et al. ats. Ross et al.	430
Cozby, Adm., ats. Illinois Central R. R. Co.	256
Culwell ats. Robley.	272

D

Danville Shirt Co. ats. Beaver.	820
Deane et al. ats. Baker.	613
Deane et al. v. Michigan Stove Co.	106
Derr, Adm., ats. Baltimore & O. S. W. Ry. Co.	180
Des Rivieres v. Lumber District Milling Co.	81
Drucker, Assignee, ats. Rogerson et al.	159
Dudgeon ats. North Chicago St. R. R. Co.	57

E

Easton ats. New York Life Ins. Co.	479
Eden, Ex., v. Bohling et al.	807
Ehdin v. Murphy et al.	555
Elliott ats. Turk.	451
Emerich Outfitting Co. ats. Mantonya.	82
Emig v. Medley.	199
English ats. City of Alton.	197
English v. City of Danville.	288
Erickson ats. Gunnerson.	159
Erwin & Co. v. Holloway.	458
Estate of Long v. Jones.	615
Exchange National Bank v. Plate.	489

F

Faith v. Taylor.....	419
Fawcett et al. ats. Baker.....	300
Feeney ats. West Chicago St. R. R. Co.....	118
Feldstein ats. West Chicago St. R. R. Co.....	86
Ferris et al. ats. Parmly.....	132
First National Bank ats. Hippach.....	33
Flannigan ats. City of East St. Louis.....	167
Fleming v. Peterson.....	38
Foote ats. Auburn Cycle Co.....	644
Forein, Ex'r, ats. Mann.....	318
Foreman Brothers ats. Allen.....	56
Fowler ats. Geis et al.....	45
Fowler ats. Morehouse.....	50
Frank ats. Palmer.....	472
Friedman v. Schwabacher.....	117
Friedrich ats. Niedner et al.....	622

G

Gage Hotel Co. v. Union National Bank.....	681
Gall ats. Beckstein.....	616
Gardner v. Girtin, Adm'x.....	422
Geis et al. v. Fowler.....	45
General Gas Co. et al. v. Stuart..	560
Gerdes v. Hill.....	320
Gibson et al. v. Safety Homestead & Loan Ass'n.....	485
Gilbert v. Murray.....	664
Girtin, Adm'x, ats. Gardner.....	423
Glos et al. v. Hewes.....	75
Goergen v. Schmidt.....	538
Goldsmith et al. ats. Leon et al.....	22
Gottschalk v. Jarmuth, Adm'x.....	623
Graham ats. Hedenberg.....	142
Gray ats. Brownell.....	122
Green ats. Kerns et al.....	195
Green ats. Illinois State Journal Co.....	305
Green ats. Liebold.....	527
Green et al. ats. Sudbrach.....	196
Gregg ats. Chicago City Ry. Co.....	77
Grieb v. Caraker.....	236
Griswold et al. ats. Jesselson.....	158
Groth v. Groth :.....	68
Gundlach ats. St. Louis B. & S. Ry. Co.....	192
Gunnerson v. Erickson.....	159

H

Haley ats. Pittsburg, C., C. & St. L. Ry. Co.....	64
Tall ats. Chicago & A. R. R. Co. use, etc.....	497

TABLE OF CASES.

11

Hallbeck et al. v. Stewart.....	225
Hanchett, Sheriff, v. Ives, use, etc.....	83
Hansen Adm'x, ats. Pioneer Fireproof Construction Co.....	659
Hansen ats. Chicago & N. W. Ry. Co.....	17
Harding v. Harding.....	312
Harris ats. Stuart.....	668
Hasterlik v. Sangerman.....	146
Hayes v. Owen et al.....	553
Hazelrigg v. Pursley.....	467
Hedenberg v. Graham.....	142
Hedrick ats. Phoenix Insurance Co.....	184
Hellman ats. Riebe.....	19
Henderson, Adm'r, v. Treadway.....	357
Hewes ats. Glos et al	75
Higgins ats. Baltimore & O. S. W. Ry. Co.....	412
Hildreth ats. Wright et al.....	588
Hill v. City Electric Ry. Co.....	441
Hill ats. Gerdes.....	320
Hill et al. ats. Kingman & Co. et al.....	456
Hines v. Union National Bank et al.....	518
Hippach v. First National Bank.....	82
Hite ats. Prudential Insurance Co.....	416
Hobson v. Tritt et al.....	215
Holloway ats. Erwin & Co.....	458
Holmstrom v. Oldham Bank	113
Hollst v. Bruse et al.....	48
Holmes v. Williams.....	114
Holt v. Tennent-Stribling Shoe Co.....	382
Home Protection Aid Association v. Simons.....	94
Holm ats. Jamieson.....	119
Huston ats. Tribbetts.....	340
Hyde Park Thompson-Houston Light Co. v. Brown et al.....	582

I

Illinois Central Railroad Co. v. Batson, Adm.....	233
Illinois Central Railroad Co. v. Beebe, Adm'x.....	363
Illinois Central Railroad Co. v. Butler	128
Illinois Central Railroad Co. v. Cozby, Adm.....	256
Illinois Central Railroad Co. v. Leggett.....	347
Illinois Central Railroad Co. ats. Pennington.....	628
Illinois State Journal Co. v. Green.....	305
Illinois Steel Co. v. Trafas.....	87
Ives, use, etc., ats. Hanchett, Sheriff.....	83

J

James ats. McPherson.....	887
James ats. West Chicago St. R. R. Co.....	609
Jamieson v. Holm.....	119
Jarmuth Adm'x, ats. Gottschalk.....	628

Jesselson v. Griswold et al.....	158
Jones ats. Estate of Long.....	615
Johnson ats. West Chicago St. R. R. Co.....	147

K

Kaestner et al. ats. Bates.....	620
Kane v. Kinnare, Adm.....	81
Keady et al. ats. White.....	405
Kee, Ex'r, ats. Switzer, Adm.....	499
Kenefick ats. Bright.....	43
Kennett et al. ats. Kruse.....	566
Kenwood Bridge Co. ats. Pennsylvania Company.....	145
Kerns et al. v. Green.....	195
Kiel v. City of Chicago.....	685
Kingman & Co. et al. v. Hill et al.....	456
Kinnare, Adm., ats. Kane.....	81
Kirkpatrick et al. ats. People, etc.....	207
Knight et al. ats. Poppers.....	578
Krueger ats. Strassheim.....	41
Kruse v. Kennett et al.....	566

L

Lafayette Building and Loan Association ats. Maloney.....	35
LaForge et al. v. Colby Bros. & Co.....	443
Lagow et al. v. Robeson.....	176
Lake Erie & Western R. R. Co. v. Murray.....	274
Langsdorf ats. Mobile & Ohio R. R. Co.....	187
LeBeau v. Pittsburgh, C., C. & St. L. Ry. Co.....	557
Lebkeucher v. Bolansen.....	297
Leggett ats. Illinois Central Railroad Co.....	347
Lengfelder v. Smith.....	238
Lewis ats. Blackman et al.....	186
Lewis ats. McIntosh.....	593
Lewis v. People, use, etc.....	244
Liebold v. Green.....	527
Lindgren-Mahan Chemical Fire Engine Co. v. Senger.....	40
Leon et al. v. Goldsmith et al.....	22
Loeb ats. Wilson & Son.....	445
Long, Estate of, v. Jones.....	615
Louisville Banking Co. ats. Chandler et al.....	604
Lumber District Milling Co. ats. DesRivieres.....	31
Luxen v. Chicago & Grand Trunk Ry. Co.....	648

M

Mackey-Nisbit Co. ats. Mitchell.....	186
Maloney v. Lafayette Building and Loan Association et al,.....	35
Maltby ats. Thews.....	30
Mann, Ex'r, v. Martin, Ex'r.....	501
Mann v. Forein, Ex'r.....	318

TABLE OF CASES.

13

Mannen v. Payne & Johnson, use, etc.....	251
Mantonya v. Emerich Outfitting Co.....	62
Manville ats. Collins.....	594
Martin, Ex'r, ats. Mann, Ex'r.....	501
Masters ats. Banks Agricultural & Transfer Co.....	573
Matthei v. Wooley.....	654
McCiary v. Warner.....	223
McDonald v. Tree	134
McFall & Whittington ats. Cipher.....	228
McIntosh v. Lewis.....	593
McKay ats. Continental Investment & Loan Society.....	73
McLean, Receiver, ats. Challacombe.....	485
McLennan ats. Supreme Lodge Knights of Pythias.....	599
McPherson v. James.....	337
Medley ats. Emig... ..	199
Metropolitan Accident Ass'n v. Bristol, Adm'x.....	492
Metropolitan Life Insurance Co. v. Quandt.....	649
Metropolitan Life Insurance Co. v. Zeigler, Adm.....	447
Michigan Stove Co. ats. Deane et al.....	106
Missionary Society of the M. E. Church v. Caldwell et al., Ex'rs...	280
Mitchell ats. Buck, Sheriff.....	219
Mitchell v. Mackey-Nisbit Co.....	186
Mobile & Ohio R. R. Co. v. Langsdorf.....	187
Moore v. City of Chicago.....	571
Moore v. People, etc.....	398
Moore ats. Williams.....	618
Morehouse v. Fowler.....	50
Murphy et al. ats. Ehdin.....	555
Murray ats. Gilbert.....	664
Murray ats. Lake Erie & Western R. R. Co.....	274
Murray ats. Rawley.....	428
Mutual Accident Association of the Northwest v. Simons.....	94

N

National Bank of Illinois ats. Beattie.....	632
New York Life Ins. Co. v. Easton.....	479
Nichols ats. Ramsey et al.....	240
Niedner et al v. Friedrich.....	622
Nolan ats. Calumet Electric St. Ry. Co.....	104
North Chicago St. R. R. Co. v. Dudgeon.....	57

O

Oldham Bank ats. Holmstrom.....	118
Owen et al. ats. Hayes.....	553

P

Palmer v. Frank.....	472
Parmly v. Ferris et al.....	182
Paris ats. Young.....	449

Patterson ats. Cleveland, C., C. & St. L. Ry. Co.....	438
Payne v. Chicago, R. I. & P. Ry. Co. et al.....	38
Payne & Johnson, use, etc., ats. Mannen.....	251
Paulis ats. Bauchens.....	202
Penn ats. Carter.....	420
Pennington v. Illinois Central R. R. Co.....	628
Pennsylvania Company ats. Bond.....	507
Pennsylvania Company v. Kenwood Bridge Co.....	145
People, etc., ats. Barclay.....	517
People ex rel. etc., ats. Commissioners of Highways, etc.....	328
People, etc., v. Kirkpatrick et al.....	207
People, use, etc., ats. Lewis.....	244
People, etc., ats. Moore.....	398
People, etc., ats. Thacker.....	325
Peterson ats. Fleming.....	38
Peterson v. West Chicago St. R. R. Co.....	580
Phoenix Insurance Co. v. Hedrick.....	184
Pioneer Fireproof Construction Co. v. Hansen, Adm'x.....	659
Pittsburg, C., C. & St. L. Ry. Co. v. Haley.....	64
Pittsburg, C., C. & St. L. Ry. Co. ats. LeBeau.....	557
Plate ats. Exchange National Bank.....	489
Poppers v. Knight et al.....	578
Prudential Insurance Co. v. Hite.....	416
Pursley ats. Hazelrigg.....	467

Q

Quandt ats. Metropolitan Life Insurance Co.....	649
---	-----

R

Rack v. Chicago City Ry. Co.....	656
Rainey ats. Consolidated Coal Co.....	182
Ramsey et al. v. Nichols.....	240
Randol ats. Wabash R. R. Co.....	482
Rawley v. Murray.....	428
Reader ats. Schultz.....	295
Reddy ats. West Chicago St. R. R. Co.....	58
Reichert ats. Chicago & W. I. R. R. et al.....	91
Reynertson v. Central Lumber Co.....	131
Rice ats. St. Louis, B. & S. Ry. Co.....	244
Riebe v. Hellman.....	19
Robley v. Culwell.....	272
Rockefeller ats. Calumet Stock Farm.....	553
Robeson ats. Lagow et al.....	176
Rogerson et al. v. Drucker, Assignee.....	159
Rose ats. Chicago Forge and Bolt Co.....	123
Ross et al. v. Cox et al.....	430
Rutan ats. Young.....	513

S

Safety Homestead & Loan Ass'n ats. Gibson et al.....	485
Sain ats. Stockbarger.....	436
St. Louis B. & S. Ry. Co. v. Gundlach.....	192
St. Louis B. & S. Ry. Co. v. Rice.....	244
Sangerman ats. Hasterlik.....	146
Schlesinger v. Allen.....	187
Schoenhofen Brewing Co. ats. Thode.....	403
Schultz v. Reader	295
Schwabacher ats. Friedman.....	117
Schmidt ats. Goergen.....	538
Scott ats. Tinsley.....	852
Seeger ats. Lingren-Mahan Chemical Fire Engine Co.....	40
Simons ats. Home Protection Aid Association.....	94
Simons ats. Mutual Accident Association of the Northwest.....	94
Smith ats. Chicago City Ry. Co.....	69
Smith ats. Lengfelder.....	238
Smith v. Smith.....	814
Smith v. Sommers Mfg. Co.....	230
Snyder v. City of Mt. Pulaski et al.....	474
Sommers Mfg. Co. ats. Smith.....	280
South Chicago City Ry. Co. v. Adamson.....	110
Sperbeck ats. City of Chicago.....	562
Spurney ats. Chicago & Grand Trunk Ry. Co.....	549
Star Elevator Co. v. Carlson.....	212
Stewart ats. Hallbeck et al.....	225
Stiver ats. West Chicago St. R. R. Co.....	625
Stockbarger v. Sain.....	486
Strassheim v. Krueger.....	41
Strockbine et al. ats. Yanaway.....	453
Stuart ats. General Gas Co. et al.....	560
Stuart v. Harris.....	668
Sturtevant v. Sullivan.....	47
Sudbrach v. Green et al.....	196
Sullivan ats. Sturtevant.....	47
Supreme Lodge Knights of Pythias v. McLennan.....	599
Switzer, Adm., v. Kee, Ex'r.....	499

T

Taylor ats. Faith.....	419
Tedrick, use, etc., ats. Wells et al.....	203
Tennent-Stribling Shoe Co. ats. Holt.....	382
Terhune v. Weston et al.....	249
Terre Haute & I. Ry. Co. v. Williams, Adm'x.....	392
Thacker v. People, etc.,.....	325
Thews v. Maltby... ..	80
Thode v. Schoenhofen Brewing Co.....	403
Tinsley v. Scott.....	852
Townsend ats. Conroy et al.....	61

Trafas ats. Illinois Steel Co.....	87
Tree ats. McDonald.....	134
Treadway ats. Henderson, Adm'r.....	357
Tribbetts v. Huston.....	340
Tritt et al ats. Hobson.....	215
Turk v. Elliott.....	451

U

Underwood v. Vail.....	679
Union National Bank ats. Gage Hotel Co.....	681
Union National Bank et al ats. Hines.....	518

V

Vail ats. Underwood.....	679
--------------------------	-----

W

Wabash R. R. Co. v. Randol.....	482
Walker et al. v. Wood et al.....	542
Wall v. Wall.....	389
Warner ats. McClary.....	223
Weber v. Bushnell.....	26
Weill v. Cornell.....	60
Wells et al. v. Tedrick, use, etc.....	203
West Chicago St. R. R. Co. v. Feeney.....	118
West Chicago St. R. R. Co. v. Feldstein.....	86
West Chicago St. R. R. Co. v. James.....	609
West Chicago St. R. R. Co. v. Johnson.....	147
West Chicago St. R. R. Co. ats. Peterson.....	580
West Chicago St. R. R. Co. v. Reddy.....	53
West Chicago St. R. R. Co. v. Stiver.....	625
Western Hay & Grain Co., use, etc. ats. American National Bank	268
Weston et al. ats. Terhune.....	249
White v. Keady et al.....	405
Wilkey v. Buck.....	179
Williams ats. Holmes.....	114
Williams v. Moore.....	618
Williams, Adm'x, ats. Terre Haute & I. Ry. Co.....	392
Wilson & Son v. Loeb.....	445
Wood et al. ats. Walker et al.....	542
Wooley ats. Matthei.....	654
Wright v. Case et al.....	585
Wright et al. v. Hildreth.....	588

Y

Yanaway v. Strockbine et al.....	458
Young v. Paris.....	449
Young v. Rutan.....	513
Young, Receiver, ats. Choisser.....	252

Z

Zeigler, Adm., ats. Metropolitan Life Ins. Co.....	447
--	-----

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1896.

Chicago & N. W. Ry. Co. v. Elida Hansen, by her Next Friend.

69	17
166.	623
69	17
70	124
69	17

1. NEGLIGENCE—*A Question of Fact for the Jury.*—Whether the methods adopted by a railroad company were inconsistent with its duty to exercise reasonable care to avoid injury to people at a crossing, and whether a person injured exercised that degree of care which an ordinarily careful and prudent person would exercise under the circumstances, are questions of fact for a jury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

E. E. OSBORN, attorney for appellant; A. W. PULVER and L. W. BOWERS, of counsel.

L. M. ACKLEY, attorney for appellee; BRANDT & HOFFMANN, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Near the crossing of the tracks of the appellant and 48th avenue, in the city of Chicago, is a passenger station of the appellant commonly called Moreland.

That is the only crossing of the tracks between 40th and 52d avenues, a distance of more than a mile.

A witness, resident there, testified that the population of the vicinage was in the neighborhood of 5,000, and that he judged that 3,000 to 3,500 people passed that crossing daily.

July 29, 1894, between 8 and 8:30 p. m., a west-bound passenger train, on the south or left hand track of the double track, struck the appellee and inflicted upon her very severe injuries.

The only question argued by the appellant is her right to recover upon the evidence.

Gates were at the crossing, but they were up. No watchman or flagman was on guard. A freight train going east on the north track was belching smoke which obscured the view eastward, hiding the coming train, and by its rumble deadening the sounds therefrom.

Under these conditions the appellee, a girl between seventeen and eighteen years of age, stepped upon the crossing.

Whether the methods adopted by the appellant were negligent, inconsistent with its duty to exercise reasonable care to avoid injury to people at such a crossing, and whether the appellee exercised that degree of care which an ordinarily careful and prudent person would exercise under the circumstances, were questions of fact for the jury, and nothing can prevent verdicts against railroads for injuries so inflicted.

The event has shown that she was rash; but to an ordinarily prudent, intelligent person would her conduct, before the event, have appeared imprudent? C., M. & St. P. Ry. v. Wilson, 35 Ill. App. 346.

No comment can make clearer our reasons for holding that the judgment should not be reversed, and it is affirmed.

MR. JUSTICE WATERMAN.

I regard the fact that when appellee entered and was upon this crossing, the crossing gates were up, as the principal fact entitling her to recover.

When a railroad puts, in this city, the crossing gates up,

Riebe v. Hellman.

it is an implied statement by it that an opportunity is then afforded for people to cross; the statement would not have been more plain if its agent had there stood and thus proclaimed. That it did not operate the gates at night is no excuse; the ordinance declares that "said gates shall be operated day and night."

Gustave Riebe v. George A. Hellman.

1. **BOARDS OF TRADE**—"*Ringing up.*"—The closing up of transactions on a board of trade, for the purchase and sale of grain, by setting off one trade against another—in the parlance of the exchange, "*ringing up*"—is not necessarily illegal.

Bill to Recover Margins.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This was a suit brought by Gustave Riebe against George A. Hellman under sections 130, 131 and 132, chapter 38 of the Revised Statutes, to recover \$4,200 in cash and \$2,600 in securities deposited by Gustave Riebe with George A. Hellman as margins in certain purchases of wheat, amounting in all to 35,000 bushels.

The court found against appellant, and entered a decree dismissing his bill.

WING, CHADBOURNE & LEACH, attorneys for appellant.

D. M. KIRTON, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Counsel for appellant say that the testimony on the trial in the court below was conflicting in the extreme. Counsel contends :

VOL. 69.]Riebe v. Hellman.

"First. That George A. Hellman never purchased, had, or sold one bushel of wheat for Gustave Riebe.

Second. That H. C. Gray, through whom Hellman claims to have effected Riebe's business, never delivered one bushel of wheat to Gustave Riebe, or to anybody for him."

We have examined the record as to these matters, and do not find that it sustains the contentions of appellant.

Appellant wrote the following letter:

"CHICAGO, August 30, 1895.

Geo. A. Hellman, Esq., City.

DEAR SIR: Please deliver to Rosenbaum Brothers of this city the 35,000 bushels of wheat that you have bought for my account for September delivery, and they will pay you for the same.

Please give them particulars at what prices this wheat is coming.

Yours truly,

GUSTAVE RIEBE."

Appellee testified: "In pursuance of this order, I went to Rosenbaum's office with my son and told them that Mr. Riebe had given me orders to deliver to them 35,000 bushels of wheat which, I had bought through Mr. Gray, and Mr. Gray would deliver the 35,000 bushels of wheat to them at sixty-four cents per bushel, and they said that was all right; that Mr. Riebe had been there and that they would take the wheat at sixty-four cents. That was the price at which the balance of \$177.90 was due Mr. Riebe."

Mr. Uhlman, a clerk for Rosenbaum Brothers, corroborated appellee and testified to the reception by Rosenbaum Bros. from him of 35,000 bushels of wheat for appellant. Mr. Gray also testified to the purchase and delivery of this wheat.

Appellee wrote to appellant as follows:

"GEORGE A. HELLMAN,
Commission Merchant, Room 511 Rialto Building.

CHICAGO, August 7, 1895.

Gustave Riebe, 34 Wabash Ave., City.

DEAR SIR: Referring to our conversation last night, in

Riebe v. Hellman.

reference to your 35,000 of September wheat, which will be delivered on or about the 1st of September, I would say to you that I shall carry your wheat until the 1st of September, and then deliver it to you. I can carry only 5,000 bushels of cash wheat for you, for the other 30,000 bushels you must provide somewhere else, as my money is not sufficient to carry all the 35,000.

I need money in my business and can not pay out for all the wheat I bought for you. This was agreed upon at the time in June, as I bought it for you for July. I can positively not carry your wheat beyond the 1st of September, and I respectfully request you to find a place where the wheat can be delivered, and paid for when it comes in to me.

A reply is respectfully solicited at once.

Yours truly,

GEO. A. HELLMAN."

In response to this appellant wrote:

"HOTEL IMPERIAL, NEW YORK, 8—11, 1895.

Mr. Geo. A. Hellman, Chicago.

DEAR SIR: Reforwarded to here, I received your favor 7th inst. on yesterday.

You have an unwarranted apprehension concerning the care of the wheat on the first of next month.

I shall be at home in time to enable me to make suitable provision for the same.

Yours truly,

G. RIEBE."

There is no dispute as to the law.

We have considered appellant's argument that the delivery notices in evidence, taken in connection with the testimony, show that appellee did not purchase this wheat, and do not agree with the conclusion arrived at by counsel.

Appellee could not have delivered 35,000 bushels of wheat to Rosenbaum Bros. for appellant, unless he, appellee, had purchased the same. If such wheat was not so delivered, it was a simple thing to have shown it. Appellant does not himself testify that Rosenbaum Bros. did not account to him for such quantity of wheat as received from appellee.

VOL. 69.]Leon v. Goldsmith.

That in the purchase and sale of this wheat, that there was what is known as "ringing up," does not make the transaction illegal. *Pardridge v. Cutler*, 1st Dist. Ill. App., opinion filed February 1, 1897.

After the delivery of the wheat to Rosenbaum Brothers, as ordered by appellant, he received the balance due him and gave following receipt:

"August 31, 1895.

Received from George A. Hellman \$177.90, in full payment of balance due on account to date.

G. RIEBE."

The decree of the Circuit Court is affirmed.

69 22
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Harry Leon et al. v. Frederick Goldsmith et al.

1. RESCISSION—*Offer to Return Property Received—Tender*.—A, desiring to rescind a contract with B, said to him: "I will give you back the notes, and you give me back the goods;" to which B replied: "I won't do that; not at present, anyhow." *Held*, that this was a sufficient offer by A to rescind, and that a formal tender of the notes was not necessary.

2. SAME—*Knowledge of Fraud*.—That a party wishing to rescind a contract did not then know of the fraud which gave him the right to do so, and was only afraid, does not affect his right to rescind.

3. INSTRUCTIONS—*To be Considered Together and in Connection with the Evidence*.—An instruction should be construed in connection with the other instructions which were given, and with the evidence which was introduced; and if, from a consideration of the entire record, it is plain that no harm was done, minor inaccuracies will not be ground for a reversal.

Replevin, for diamonds. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

Moses, Pam & Kennedy, attorneys for appellants.

Felsenthal & D'Ancona, attorneys for appellees.

Leon v. Goldsmith.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In August, 1895, the appellees, diamond importers in New York, sold on credit to Leon, of Chicago, diamonds to the amount of \$6,465.39. It is conceded that the purchase was by fraud. This suit is defended in the interest of his assignee for the benefit of creditors. In September Goldsmith came to Chicago, and as part of a conversation with Leon, Goldsmith (having the notes which Leon had given for the diamonds then in his pocket), said to Leon: "I will give you back the notes and you give me back the goods," to which Leon replied, "I won't do that; not at present, anyhow."

That was a sufficient offer by Goldsmith to rescind; a formal tender of the notes was not necessary. 21 Am. & Eng. Ency. of Law, 86 *et seq.*

That Goldsmith did not then know of the fraud which gave him the right to rescind, and was only afraid, does not affect the question.

The real contest in this case is, whether the diamonds which were taken upon the replevin writ sued out by the appellees were the same diamonds which they had sold to Leon. The testimony that they were was emphatic, positive and unambiguous; whether credible or not was a question for the jury.

Incautious instructions, of which the one copied below is a sample, were given to the jury at the request of the appellees:

"The jury are instructed that if they believe from all the evidence in this case that the property for which replevin was brought was bought from Herzog, Goldsmith & Frank, under false representations made by Leon, which representations were relied on by the plaintiffs, and the goods sold to him on the strength of such representations; or if the jury believe from all the evidence in this case that Leon bought the goods from the plaintiffs with fraudulent intent never to pay for the goods, then no title to such goods passed to Leon, and the plaintiffs are entitled to the possession of such goods, and your verdict must be for the plaintiffs."

But *per contra* were given for the appellants others, of which one was:

"1. The court instructs the jury that this is an action of replevin, commenced by the plaintiffs by the filing of an affidavit wherein they claim, under oath, that they are entitled to the possession of certain diamonds described therein. Before the plaintiffs can recover under their claim they must establish by a preponderance of the evidence that the diamonds which they took from the possession of Harry Leon, under the replevin writ issued upon the strength of said affidavit for replevin, were and are the diamonds which were originally sold and delivered by the plaintiffs to Harry Leon, and upon this issue it is the duty of the plaintiffs to prove the facts by a preponderance of the evidence, and if they have not done so, then the plaintiffs can not recover, and the verdict of the jury should be for the defendants.

If the evidence upon the question of the identity of the diamonds does not preponderate in favor of the plaintiffs, but is evenly balanced, or if the jury, from the evidence, can not determine where the preponderance lies, then the plaintiffs can not recover, and the verdict should be for the defendants."

Now the jurors being, by statute, "well informed and who understand the English language," and having the instructions read to them—the first one first, and the other afterward—would readily comprehend that the phrase "for which replevin was brought" in the first, meant the same as, and was restricted to, those which were taken "under the replevin writ," as the phrase is in the second.

And this conclusion is fortified by a statement in the bill of exceptions. After the counsel for the appellants had partly cross-examined the first witness of the appellees, the bill states:

"And the court certifies that here at this juncture, by the agreement of the parties to this cause, and for the purpose of facilitating the trial thereof, the court, at the commencement of said cause, heard the arguments of counsel

Leon v. Goldsmith.

upon the question of what proof was admissible and necessary as to the identity of the goods, and the parties hereto then and there agreed that said bill of exceptions should show and contain the following:

That the plaintiffs insisted, when they introduced evidence to prove up their case, that upon proof of title in the plaintiffs at the time of bringing suit to the property mentioned in the affidavit and declaration, as well as in the plea, the plaintiffs were entitled to a verdict, and that they were not bound to offer any proof whatever as to the identity of the goods; that such was not necessary under the pleadings in the case, and that the sheriff's return that he had replevied a part of the goods described in the writ of replevin, could not be contradicted at this time, and that such return could only be contradicted by motion to quash the writ or by plea in abatement; but the court refused to assent to such contention, and then and there compelled the plaintiffs to offer proof as to the identity of the goods; and the plaintiffs then and there excepted to the ruling of the court.

That the plaintiffs further objected to any evidence being offered by the defendants upon the question of the identity of the goods, for the same reason, and objected to all the evidence offered by the defendants on that subject; but the court overruled such objections, to which rulings of the court the plaintiffs then and there duly excepted."

That the words "at the commencement of said cause" do not mean when the writ of replevin was sued out, but do mean when the trial began, we shall assume without comment, and that such argument preceded the impaneling of the jury is highly improbable.

Thus, besides the aid derived from the written instructions, the jury were enlightened by the debate of counsel and the decision thereon.

We may not say that we do not believe that an expert can recognize a lot of little diamonds, as it is said that shepherds do sheep. It is common experience that one can not readily identify individuals of a foreign and unfamiliar

race; shall we then say that they must doubt the identity of each other?

Now, that identification is all that is in issue, and the jury by their verdict sanctioned it, the judgment is affirmed.

Otto E. Weber v. Milton B. Bushnell and Carl C. Bushnell.

1. **MECHANIC'S LIENS—Assignment of Contract—Decree in Favor of Sub-contractor.**—A building contract was assigned to sub-contractors as collateral security, and was subsequently reassigned to the original contractors who brought lien proceedings and obtained a decree ordering payment of the amount found to be due to themselves and to the sub-contractors. *Held*, that the assignment did not defeat the claim for a lien, that the complainants were the proper parties to file the petition, and that, it being made to appear that the sub-contractors were equitably entitled to a part of the moneys due to the complainants, the court properly so decreed.

2. **SAME—Waiver.**—Whether a lien has been waived is essentially a matter of intention, especially as between the owner and the contractor.

Mechanic's Lien Proceedings.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

M. B. & F. S. LOOMIS, attorneys for appellant.

WILLIAMS, LINDEN, DEMPSEY & GOTTF, and J. A. COLEMAN, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Appellant was the lessee, for a term of ninety-nine years, of certain premises in Chicago, and on October 4, 1894, entered into a written contract with the appellees, whereby the latter undertook to erect for him an apartment house upon the premises for the agreed price of \$40,000, and this

69 26
171s 587

Weber v. Bushnell.

was a petition filed by appellees to establish a mechanic's lien upon said premises for a balance claimed to be due to them under the contract.

The decree found that although the nominal price to be paid was \$40,000, the actual price was only \$28,750.

It further found that appellees made a sub-contract with Von Platen & Dick, whereby the latter were to furnish material and labor upon the building, and that there was due to them the sum of \$8,269.35 therefor, which constituted a part of a total of \$8,433.04, found to be due to appellees.

Von Platen & Dick came into the transaction about March 5, 1895, upon which date they entered into a written agreement with appellant, wherein it was recited, among other things, that "Von Platen & Dick have agreed to complete the unfinished work as far as the funds herein-after named will permit, and to carry out from this date the contract heretofore made by and between said Otto E. Weber and the firm of M. B. and C. C. Bushnell, and also with the firm of Dinwiddie & Newberry, architects, as far as said funds will permit."

And it was agreed as follows, in part:

"Said Otto E. Weber hereby assigns, transfers and conveys said property heretofore described, to said Von Platen & Dick, as trustees, for the purpose hereinafter named.

First. Said Von Platen & Dick are to furnish funds to complete the work on said building, to the point where, according to the terms of said lease, said Otto E. Weber is entitled to draw on the loan of twenty-five thousand dollars (\$25,000) made thereon by Lyon, Gary & Co., whereupon said Von Platen & Dick are to draw the money on the loan made by Lyon, Gary & Co. to the said Weber, and to pay out the same as follows, to wit:

To Dinwiddie & Newberry seven hundred and fifty dollars (\$750). To M. B. and C. C. Bushnell the balance of said loan."

And on the same date there was indorsed upon the back of the contract entered into between appellant and appellees the following:

"For value received we hereby assign and transfer this contract to Von Platen & Dick, March 5, '95.

BUSHNELL & BUSHNELL,
M. B. BUSHNELL,
C. C. BUSHNELL.

I consent to the above assignment, March 5, 1895.

Otto E. WEBER."

And subsequently the following was also indorsed upon said contract:

"This contract having been assigned to us by M. B. Bushnell and C. C. Bushnell, on the 5th day of March, 1895, as collateral security, we do hereby surrender said collateral and re-assign and retransfer said within contract to said M. B. Bushnell and C. C. Bushnell November 4, 1895.

VON PLATEN & DICK."

Appellant's brief says:

"The principal contention here, as in the court below, is over the following propositions, to wit :

First. The assignment of the original building contract by complainants to Von Platen & Dick defeated any right or claim for a lien on the part of complainants.

Second. All right or claim for a lien, either on the part of complainants or of Von Platen & Dick, was superseded and rendered null and void by the subsequent contract between defendant Weber and Von Platen & Dick, made and acted upon with the knowledge and consent of complainants, and for their benefit.

Third. Complainant's lien, if they ever had any, was lost, because they did not, within four months after the last payment became due and payable according to the terms of the original contract, either bring suit to enforce their lien or file their claim for a lien with the circuit clerk, as required by the statute.

Fourth. Complainant's lien, if they ever had any, was defeated because of an overcharge on their part of \$11,750; such overcharge having been made by them with intent to defraud defendant Weber.

Fifth. The notice of sub-contractors' lien by Von Platen

Weber v. Bushnell.

& Dick was not given within the time required by the statute.

Sixth. Errors in the findings and decree of the court below."

We may but briefly speak of such propositions. The answer to the first one is that the question of application of the avails of the lien does not concern the appellant. We think the evidence fairly shows that the assignment of the contract by the Bushnells to Von Platen & Dick was intended to be only as collateral security, and not absolute, and that it was always so considered by appellant until it became his interest to defeat the lien.

As between the appellees and Von Platen & Dick, the record discloses no controversy, and we see no ground to permit the appellant to concern himself with the decree in such regard so long as he is not prejudiced. The appellees were the proper parties to file the petition, and it being made to appear to the court that Von Platen & Dick were equitably entitled to a part of the moneys due to appellees, the court properly so decreed it. We refer to Phenix M. Ins. Co. v. Batchen, 6 Ill. App. 621, and Major v. Collins, 11 Ill. App. 658.

As to the second proposition, we have examined the answer of appellant, and fail to discover that he presented any such issue in the court below, and we will therefore not take time to demonstrate from the agreement itself that no waiver of lien was intended by it.

Whether a waiver of lien has happened, is essentially a matter of intention, especially as between the owner and the contractor. Phillips on Mech. Liens, Sec. 273 *et seq.*

The third, fourth and fifth propositions, severally, depend upon our finding the facts upon which they hang contrary to the findings made by the chancellor, and we do not think the evidence would justify us in so doing.

The sixth proposition, as argued, presents no questions not already touched upon.

Our conclusion upon the whole record is, that there was no error of which the appellant can complain, and the decree will therefore be affirmed.

69 30
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Albertine Thews v. George K. Maltby.

1. **SPECIFIC PERFORMANCE—Necessary Allegations in Bill for.**—An averment of good title in the vendor is an essential part of a bill for the specific performance of an agreement for the sale of land.

2. **SAME—Proof of Title Required.**—Evidence that the complainant, in a bill for the specific performance of a contract for the sale of land, traced his title to a warranty deed made a little more than seven years before the bill was filed, by persons in whom no title was shown, is not sufficient to sustain a decree; and the fact that the defendant refused to examine an abstract of title is immaterial.

Bill for Specific Performance, of a contract for the sale of land. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and bill dismissed. Opinion filed February 9, 1897.

F. H. TRUDE, attorney for appellant.

W. B. MOAK, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee filed this bill to enforce specific performance of an agreement by the appellant to buy from him a house and lot.

In his bill he necessarily averred that he had a good title. *Krause v. Krauss*, 58 Ill. App. 559; *Roby v. Cossitt*, 78 Ill. 638.

The form of his averment was that he was "seized in fee simple." He did not attempt to prove that averment; only proved that he traced title back to a warranty deed made by persons in whom no title was shown a little more than seven years before the bill was filed. This was of no avail. *Page v. Greeley*, 75 Ill. 400.

The master reported against the title, but the court, without further evidence of title, and without any finding that the appellee had title, entered a decree for specific performance, apparently as a penalty upon the appellant for refusing to examine an abstract.

The decree is reversed, and the bill dismissed at appellee's costs, without prejudice to any action at law that the appellee may choose to bring. Reversed and bill dismissed.

Des Rivieres v. Lumber District Milling Co.

George R. Des Rivieres v. Lumber District Milling Company.

1. CONTRACTS—*A Contract Construed.*—A and B made a contract by which A agreed to sell to B “all the surplus shavings made by him at his mill on the corner of Throop and Hinman streets for one year.” Before the year was out A left the mill described and took another. B sued for a refusal by A to deliver the shavings made at the new mill. *Held*, that such refusal did not give B a cause of action.

Assumpsit, for breach of contract to sell shavings. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

STIRLEN & KING, attorneys for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In August, 1891, these parties made a contract by which the appellee agreed to sell to the appellant all the surplus of shavings made by the appellee at its mill on the corner of Throop and Hinman streets, for one year from the tenth day of that month, after retaining what might be needed for fuel for the mill and other use of the appellee.

There is no other designation of the subject of the sale than such shavings as might be made at a particular mill, and no agreement by the appellee, express or implied, to make shavings. It would be absurd to suppose that the parties contemplated that the appellee should, regardless of other considerations, continue its business for the mere purpose of producing shavings for the appellant.

The identity of the subject of sale is fixed by the same principle of construction as is applied to insurance on merchandise or household goods. *Bradbury v. Insurance Companies*, 80 Maine, 396.

The product by the appellee at that one mill then occupied

VOL. 69.] Hippach v. First Nat. Bk. of Rushville.

by the appellee, and nothing else, was what the appellee agreed to sell.

Before the year was out, the appellee left that mill and, from the same owner, took another on the opposite side of Throop street.

The appellant sued for a refusal by the appellee to deliver the shavings made at that mill. The Superior Court rightly held that such refusal was no cause of action, and the judgment is affirmed.

69 32
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Louis A. Hippach v. First National Bank of Rushville.

1. COPY OF ACCOUNT SUED ON—*When a Part of the Record.*—The copy of an instrument sued on, filed in an action at law, is not a part of the record unless embodied in a bill of exceptions.

Assumpsit, on a deficiency decree. Appeal from the Superior Court of Cook County: the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Mr. Presiding Justice SHEPARD dissenting. Opinion filed February 9, 1897.

STATEMENT OF THE CASE.

This was an action of debt brought in the Superior Court of Cook County by the First National Bank of Rushville, Nebraska, against Louis Hippach, of Chicago, on a deficiency decree for \$3,385.46, recovered against Mr. Hippach in the District Court of Nebraska. The summons was issued to the May term, 1896, and served on appellant on April 21, 1896, more than ten days before the beginning of that term. On April 24, 1896, likewise more than ten days before the beginning of the May term, the appellee filed its declaration, consisting of one special count, based upon the deficiency decree mentioned. It is alleged in the brief of appellant that no copy of the record of the judgment or decree was filed with the declaration ten days prior to the May term, nor at any time.

Hippach v. First Nat. Bk. of Rushville.

Appellant did not plead, and on May 12, 1896, which was at the term to which the summons was made returnable, appellee took the default of appellant and judgment for \$3,385.46 debt, and \$67.71 damages. From this judgment appellant prayed an appeal.

MANN, HAYES & MILLER, attorneys for appellant.

R. L. TATHAM, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is insisted by appellant that "inasmuch as no copy of the judgment or decree sued on was filed with the declaration ten days prior to the beginning of the May term, the case should have been continued to the next term of the court under the general order; that appellant was not in default at the May term, and the court, under the statute, had no right and no authority to enter the default of appellant and render judgment against him.

The Statutes of Illinois, chapter 110, section 18, provide: "If the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, * * * ten days before the court at which the summons * * * is made returnable, the court, on motion of the defendant, shall continue the cause at the cost of the plaintiff, unless it shall appear that the suit was commenced within ten days of the sitting of the court, in which case the cause shall be continued without costs, unless the parties shall agree to have a trial."

A bill of particulars is not a part of the record of a suit at law; to make it such, it must be incorporated into a bill of exceptions. Eggleston v. Buck, 24 Ill. 262.

Nor is the copy of an instrument sued upon, filed in an action at law, a part of the record, unless embodied in a bill of exceptions. Garrity v. Lozano et al. 83 Ill. 597; Thompson v. Kimball, 55 Ill. App. 249.

In Lambert v. Jonte, 28 Ill. App. 591, a failure to file a

VOL. 69.] Hippach v. First Nat. Bk. of Rushville.

copy of the instrument sued upon, and a failure to file a declaration are, under the statute, put upon the same footing, the court holding that the failure to file either, will prevent a judgment by default for want of a plea.

There is a marked distinction between a declaration and a copy of the instrument sued upon. A declaration in a common law court of record is essential to the validity of a judgment for the plaintiff; such declaration is a part of the common law record; a copy of the instrument sued upon is not essential to the validity of a judgment for the plaintiff, neither is it a part of the common law record. Stratton v. Henderson, 26 Ill. 68, 75; Hopkins v. Woodward, 75 Ill. 62, 65.

The statute also provides: "That in all actions when the plaintiff shall not be a resident of this State * * * he shall, before he institutes such suit, file or cause to be filed, * * * security for costs."

Yet the objection that a plaintiff has not filed a bond for costs is held to be of a dilatory character, in the nature of a plea in abatement, and if not insisted upon at the proper time, is to be considered as waived. Randolph v. Emerick, 13 Ill. 344; Dunning v. Dunning et al., 37 Ill. 306; Lee v. Waller, 13 App. 403.

An objection for want of bond for costs can not be taken for the first time in an Appellate Court. Meyer et al. v. Wiltshire, 92 Ill. 395.

Without, however, considering the analogy that may be drawn between the provisions of the practice act, as to the filing of a bond for costs and a copy of the instrument upon which suit is brought, we affirm the judgment of the Superior Court because, there being no bill of exceptions, from an examination of the record we can not say that no copy of the instrument sued upon was filed ten days before the term at which judgment was taken.

The judgment of the Superior Court is affirmed.

MR. PRESIDING JUSTICE SHEPARD dissents.

Maloney v. The Lafayette B. & L. Ass'n.

Hugh Maloney and Elizabeth Maloney v. The Lafayette Building and Loan Association et al.

1. **MORTGAGES—Taking Additional Security.**—The mere assignment of a lease as additional security does not operate as a discharge of or as a payment on a note of the assignor, nor prevent the foreclosure of a mortgage given to secure such note.

Bill, for foreclosure. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

WILLIAM E. HUGHES, attorney for appellants.

WILLIAM F. WIEMERS, attorney for The Lafayette Building and Loan Association, appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree foreclosing a mortgage made by appellants to a building and loan association.

It is urged that appellant Hugh Maloney was not in default, because he had assigned to the attorney of the association, he being also one of its directors, a lease of the mortgaged premises; one Peter Fortune, said to be a man of ample means, being a guarantor of the rent reserved in said lease.

It does not appear that the rent was received by the society; on the contrary, it seems that a brewing company, with which Mr. Fortune is connected, collected and has retained the same.

The mere assignment of this lease as additional security did not operate as a discharge of any of the obligations of Hugh Maloney, nor did the collection of rent by the brewing company, neither does it appear that either or both of these things should constitute payment by Hugh Maloney.

We find no error in the proceedings.

The decree of the Superior Court is affirmed.

69 36
169s 139

69 36
85 612

West Chicago St. R. R. Co. v. Dora Feldstein.

1. TORTS—*Committed by Several Persons Acting Together—Liability for.*—Where several tort-feasors have contributed to the same end, either may be held responsible for the entire tort.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

FRANCIS T. MURPHY, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On October 22, 1894, as an east-bound horse car on the Adams street line of the appellant was crossing State street it was run into by a south-bound cable train operated by the Chicago City Railway Company. The horse car was struck near its front end, and was thrown diagonally across the Adams street tracks, on which it was traveling.

The east or front end of the car was thrown to the south of the tracks, and the west or hind end to the north of the tracks.

The appellee was at the moment standing at the crossing waiting for the horse car to pass in front of her in order that she might proceed, and as the hind end of the horse car flew northward she was hit by it, and received the injuries she sued to recover for.

Appellant's argument, that the verdict was not sustained by the evidence, is mainly directed to demonstrating that the collision occurred through the fault of the City Railway Company, but while such may be true, the question we are concerned with is whether the appellant contributed in a

West Chicago St. R. R. Co. v. Feldstein.

material degree to the result. The appellee was in a part of the street where she, as a pedestrian, had a right to be, and was pursuing her course, as she lawfully might. The question with her is not which of the two railway companies was most at fault, but is, did the appellant contribute to the injury she received? She sued both companies together, but at the trial dismissed her suit as to the City company and took her verdict and judgment against the appellant alone. Her right to do so is not questioned, and we will not cite authorities that such a practice was proper.

The degree of fault, if there were any fault attachable to appellant, is immaterial so far as she is concerned. There was evidence that tended to show that in a considerable degree, at least, appellant was negligent in that its driver failed to see the cable train as he should have done, and did not wait for it to pass, and appellee had her right of action against both or either of the wrong-doers. Either one was responsible to her for the whole injury, and the degree of blame as between them was immaterial.

“When the contributory action of all accomplishes a particular result, it is unimportant to the party injured that one contributed much to the injury, and another little; the one least guilty is liable for all because he aided in accomplishing all.” Cooley on Torts (2d Ed.), 155.

In the case of St. Louis Bridge Co. v. Miller, 138 Ill. 465, the court say: “Where several tort-feasors have co-operated to the same end, either may be held responsible for the entire tort. The fact that the injury could not have happened without the wrongful act of one is not a test of the non-responsibility of the other. A tort may be of such character as to require for its perpetration the concurrent action of several, so that if either one fails in his part, the tort is not committed. In such case it may properly be said that but for the wrongful act of either of the tort-feasors, the wrong could not have been committed. But that fact can not be urged in exonerating of the others.”

The damages, although moderate as the awards of juries nowadays go, were perhaps larger than time would justify

VOL. 69.]

Fleming v. Peterson.

in so youthful and healthy a person, but taking into account the testimony of appellee and the two physicians in her behalf, it is not demonstrably so, and we do not feel warranted in disturbing the judgment on that account.

The instruction that is complained of is free from any error that is pointed out, and there being no substantial error in any respect that our attention has been called to, the judgment is affirmed.

1

Patrick H. Fleming v. Hattie E. Peterson.

9a 38
7a 48.
9b 38
0s 607

1. FORMER DECISIONS—*In the Same Case are Binding.*—For the lower court, and for this court on a second appeal, the decision on the first appeal is the law of the case.

Bill, to enforce a contract. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed February 9, 1897.

JOHN C. RICHBURG, attorney for appellant.

COLIN C. H. FYFFE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This cause has before been here. The opinion then given, Peterson v. Fleming, 63 Ill. App. 357, controls the court at the present time.

The facts are set forth in that opinion, and upon the authority of the former holding, the decree of the Circuit Court is affirmed.

James H. Payne v. The Chicago, R. I. & P. Ry. Co. et al., Garnishees of James E. Lee.

1. APPELLATE COURT PRACTICE—*What the Record Must Show.*—Where the record fails to show any evidence of the liability of a party sued, a judgment in his favor must be affirmed.

Payne v. C., R. I. & P. Ry. Co.

Debt, with attachment in aid. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This was an action of debt, with attachment in aid, brought by James H. Payne against James E. Lee, based upon a judgment in favor of the plaintiff against the principal defendant, obtained in the United States Circuit Court in and for the Southern District of Iowa, Eastern Division, at Keokuk, in the State of Iowa, on the 24th day of March, 1888, for the sum of \$1,430.39 and costs, on which judgment it was asserted by affidavit there was due, on March 13, 1896, the sum of \$2,112.20.

The appellees herein were summoned as garnishees of the principal defendant, James E. Lee.

The garnishees severally answered, and the principal defendant pleaded to the declaration and the cause proceeded to trial, resulting in a judgment in favor of the plaintiff (appellant) against James E. Lee, the principal defendant, for \$1,687.20, and in a verdict and judgment in favor of the garnishees, who are appellees here.

WILLIAM M. JONES and W. IRVING CULVER, attorneys for appellant.

WALTER W. ROSS, attorney for appellees; ROBERT MATHER and W. T. RANKIN, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The judgment of the Circuit Court discharging the garnishees must be affirmed, if for no other reason, because the record fails to show any evidence that the garnishees were indebted in any sum to the principal defendant, Lee.

Lindgren-Mahan Chemical Fire Engine Company v. J. F. Senger.

1. **SHORT CAUSE CALENDAR—*Motion to Strike Cause from.***—It was alleged in support of a motion to strike a case from the “short cause calendar” that the attorney making the motion went to the clerk’s office, on receiving notice that the necessary affidavit had been filed, but found no affidavit where it ought to have been, if filed, nor any registry of such affidavit. It did not appear that he made any inquiry for the affidavit, nor whether such affidavit was in fact then on file or not. *Held*, that the motion was properly denied.

Transcript from a Justice of the Peace.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

ALLAN C. and FRED W. STORY, attorneys for appellant.

Jos. W. EKRANT and W. H. TROYER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for wages. The defense was that the appellee slighted his work.

The jury chose to believe the testimony on behalf of the appellee, rather than that on behalf of the appellant, as to the truthfulness of that defense, and their verdict is final. The case was tried upon a “short cause calendar,” and the appellant urges that the court wrongly denied its motion to strike the case off that calendar because the notice served stated that an affidavit had been filed, and the attorney at once went to the clerk’s office, and found there no affidavit where it ought to have been, if filed, nor any registry of such affidavit.

It does not appear that he made any inquiry for the affidavit, nor does it appear whether such affidavit was in fact then on file or not.

There is no error, and the judgment is affirmed.

Strassheim v. Krueger.

Christopher Strassheim v. Charles Krueger.

1. **LEVY—OF EXECUTION—WHEN PROPERLY MADE.**—A made a bill of sale of his stock of goods to B, his brother-in-law, but continued the business as formerly; one of his creditors made a levy on the stock, and B sued the creditor for trespass for such levy. The evidence showed that there was no consideration for the sale, and that the bill was not acknowledged and recorded in accordance with the law relating to chattel mortgages, and tended to show that it was made to secure a debt to B's mother. *Held*, that the levy was properly made.

TRESPASS, FOR A WRONGFUL LEVY. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

WALKER, JUDD & HAWLEY, attorneys for appellant.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of trespass by the appellee against the appellant.

The appellant was a creditor, by judgment and execution, of one George DeWeil, whose wife is sister of the appellee, and Mrs. Charles Sohl is their mother. DeWeil was a grocer at 2503 State street, Chicago. He owed his mother-in-law \$1,000, either inclusive or exclusive—we can not tell which—of \$500 mentioned in a bill of sale hereinafter referred to. September 7, 1892, DeWeil made a bill of sale of everything connected with the business to the appellee, which bill was acknowledged before a notary and recorded in the recorder's office.

The consideration expressed was \$1,000, and the bill recited that it was subject to a chattel mortgage to Mrs. Sohl for \$500. The appellee testified that the mortgage had been paid, but not by him.

It does not appear that in the whole business he has ever

parted with a penny; in fact, the conclusion is irresistible that, if the protection of DeWeil was not the object, or one of the objects, of the bill of sale, security to Mrs. Sohl was the sole object. No value of the property at the time appears. No change, visible to the world, was made in the conduct of the business, or in the signs on the store or delivery wagon. The only changes that the appellee claims were made as to the conduct of the business are, that he used to go to the store every night and see that things were all right—took out a policy of insurance—and DeWeil assumed the character, between themselves, of manager, at a salary of \$12 per week, taken from the income of the business and charged up on the books.

Now, if, instead of this bill of sale for the security of Mrs. Sohl, DeWeil had made to her a chattel mortgage of the property, followed by the same conduct as is shown by this record, such mortgage would have been void as to the merchandise as against an execution creditor of DeWeil. *Deering v. Washburn*, 141 Ill. 153.

The bill of sale, being for security, is subject to the law on Chattel Mortgages, Sec. 1, Ch. 95, Mortgages.

The execution mentioned in the beginning of this opinion was levied upon the merchandise in the store. Such levy was rightful, and the appellant is not liable in damages therefor.

The court instructed that "If, from the preponderance of the evidence and under the instructions of the court, you find that the title to the property in question was (at the time of its seizure) in the plaintiff, and that he was either personally or by his agent or agents in possession of the same, then this suit was properly brought in his name as plaintiff, even if his title was in him for the benefit and protection of his mother upon her demands against George DeWeil."

This instruction was wrong.

The judgment is reversed and the cause remanded.

Bright v. Kenefick.

69	43
181	600

69	43
87	593

George M. Bright, doing business as Washington Hardware Company, v. William Kenefick.

1. **CAUSE OF ACTION—*Foreign Judgment and Original Claim—Election.***—A brought suit against B, declaring on a judgment obtained in the State of Virginia, and on a bill of exchange on which such judgment was based. *Held*, that A was not required to elect as to whether he would base his action on the judgment or the bill of exchange, but might declare upon and offer evidence of both of said supposed causes of action and recover if he established either of them.

2. **TRIALS—*Upon an Erroneous Theory.***—When the record shows that a case was tried by the court upon an erroneous theory, the judgment must be reversed.

Debt, on a judgment, with counts on a bill of exchange. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This suit was brought in debt. A declaration containing two counts was filed upon an alleged judgment against appellee, obtained in the Circuit Court of Washington County, Virginia, and two counts upon the draft or bill of exchange which formed the basis of the action in Virginia, wherein the judgment in this cause declared upon was obtained. The appellee, as to the counts upon the judgment, pleaded *nul tiel* record, a plea setting up no authority for the appearance alleged in the said Virginia suit, and the further plea that the judgment in Virginia was one *in rem*, and as to the two counts upon the bill of exchange itself, appellee pleaded payment and *nil debit*.

The suit in Virginia, wherein the alleged judgment was obtained, was an attachment suit brought against appellee by the appellant. The Abingdon Coal & Iron Company of Virginia, was joined as garnishee. The judgment roll introduced in evidence shows that service was had upon the defendant, William Kenefick, the appellee herein, by publication only; personal service was had upon the Abingdon Coal & Iron Railroad Company.

Subsequently, certain attorneys by name of Rhea & Peters, of Abingdon, Virginia, appeared in said suit on behalf of the appellee, and moved the court to remand the cause to rules, upon the ground that the publication had not matured. This appearance of the appellee in that cause, it is contended, was without authority.

A jury having been waived, the court found the issues and rendered judgment for the defendant.

EDGAR BRONSON TOLMAN, attorney for appellant.

GOODRICH, VINCENT & BRADLEY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the trial the court refused to hold the following propositions of law tendered by the plaintiff:

"Fifth. The court holds the law of this case to be that the plaintiff is not required to elect as to whether he will base his action upon the judgment offered in evidence in this case or the bill of exchange offered in evidence in this case, but he may declare upon and offer in evidence both of said supposed causes of action, and if entitled to recover upon either of them, judgment should be rendered in his favor upon such cause of action.

Sixth. The court holds the law of this case to be that if the judgment offered in evidence was a valid judgment, the plaintiff should recover upon such cause of action, but if the said judgment is not a valid judgment *in personam* by reason of lack of jurisdiction over the person, as claimed by the defendant in this case, that then the rendition of such judgment, being a judgment *in rem* only, for want of jurisdiction over the persons, does not work a merger of the original cause of action, to wit, the bill of exchange offered in evidence herein."

Either there was or was not, in the court of Virginia, a valid judgment *in personam* against appellee; if there was no such judgment, because appellee never authorized any one

Geis v. Fowler.

to appear for him in said cause, then the claim of appellant against appellee upon the bill of exchange remained unaffected by that judgment.

If there be a merger, it is because of the validity of such judgment.

The claim of appellant is not, as appellee insists, that he, appellant, "shall have his cake and eat it too;" but that if the cake has not been eaten, as appellee contends, then he, appellant, still has it.

The court ought, therefore, to have held the fifth and sixth propositions of law tendered by the plaintiff. Such refusal shows that the case was determined upon an erroneous theory; and the judgment must, therefore, be reversed and the cause remanded. Kimball & Co. v. Doggett, 62 Ill. App. 528; West Chicago Park Comm'rs v. Kinkade, 64 Ill. App. 113.

Reversed and remanded.

Albert J. Geis and James L. Veronee v. William A. Fowler.

1. CONSIDERATION—*What Can Not be Pleaded as a Failure of--Set-Off.*—The consideration for a note which had been assigned, having partially failed, the payee requested the payor to honor the note, offering to make an allowance on another note due at a later date, and the first note was accordingly paid. In a suit on the second note by an assignee after maturity, *it was held* that these facts could not be pleaded as failure of consideration or as a set-off, but that they were admissible under the general issue.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

WILBUR & HAUZE, attorneys for appellants.

G. FRANK WHITE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellants upon a promissory note given for paper.

Upon a previous purchase they had given and paid a note, of which the consideration had partly failed by reason of defective quality of the paper, but which note, having been discounted, the appellee requested the appellants not to let it go to protest, and on the note in suit the damages, by reason of the defective quality of the paper, which was the consideration of the first note, should be allowed, and thereupon the appellants paid the first note, at least this was the defense the appellants made, but the court struck it out. If this was a defense at all, it was admissible under the general issue. It could not be pleaded as failure of consideration, for the consideration which failed was of the other note.

Nor as a set-off, for the transactions were all between the appellants and a corporation of which the appellee was president, so that the cross-demand was not against the plaintiff in this suit, nor was it of such a nature as is provided for in section 12 of the act concerning negotiable instruments.

Payment, accord and satisfaction, release, are defenses admissible under the general issue.

This is neither, but it is of the nature of them in respect that it is matter of defense accruing by virtue of the agreement after the note sued upon was made, and especially in the nature of accord and satisfaction, in respect that the agreement was to accept, *pro tanto*, the damages under the former transaction in satisfaction of the demand upon the later one. The objection now first made by the appellee, that the rule by which the damages were to be measured was not the right one, is not in order; the defense was rejected as being wholly inadmissible. When it is let in will be the time to determine how the amount of it shall be ascertained. *Walbridge v. Kibbee*, 20 Vt. 543, is very much in point.

The judgment is reversed and the cause remanded.

B. F. Sturtevant Co. v. Sullivan.

B. F. Sturtevant Co. v. D. E. Sullivan.

69	47
102	197

1. **DEPOSITIONS—*Improper Opening of—How Shown in Court of Appeal.***—The fact that a deposition was opened or removed from the files by the attorney for one of the parties, can be made to appear only by a bill of exceptions.

2. **APPELLATE COURT PRACTICE—*Certified Copies of Orders.***—The filing of a certified copy of a general order for the opening of depositions, does not bring such order before a court of appeal; that can be done only by a bill of exceptions.

3. **PLEADING—*Leave to File Additional Pleas—Statute of Frauds.***—The granting of leave to file additional pleas is within the discretion of the court, and refusal of leave to plead the statute of frauds is seldom held to be an abuse of discretion.

4. **CONTEMPT—*Improper Opening of Deposition.***—If an attorney in a suit opens a deposition in such suit without an order of court he is guilty of contempt and may be dealt with accordingly.

Assumpsit, for a wrongful discharge. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This was a suit in assumpsit brought by appellee to recover from appellant for a balance claimed to be due under a contract of hiring.

The plaintiff claimed to have been employed by appellant as a draughtsman, and to have been, before the expiration of the term for which he was engaged, without cause, discharged.

There was a verdict and judgment for the plaintiff, from which the appellant, a corporation, appeals.

GEORGE EDMUND Foss and WILLIAM J. CANDLISH, attorneys for appellant.

D. E. SULLIVAN, *pro se;* JOHN J. McDANNOLD, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A deposition read in evidence by the plaintiff is said by

appellant to have been opened before the trial; this, it is alleged, was done without any order of court. Upon the trial the defendant objected to the reading of the deposition, on the ground that the same was opened and removed from the files by the plaintiff's attorney without leave of court. If the plaintiff's attorney did as was charged in the objection, he was guilty of a contempt of court, and the defendant might, and may now, move to have him dealt with therefor.

If we were to presume that the charge contained in the objection is well founded, we should conjecture, from the action of the court, that the deposition was opened under some order of court not here shown. As it is, there is nothing in the record showing that the deposition was opened or removed from the files by the attorney of the plaintiff; such fact could be made to appear only by a bill of exceptions. The bill of exceptions does not so show.

The filing by appellee of a certified copy of a general order for the opening of depositions does not bring such order before us; that can be done only by a bill of exceptions.

We find no error as to the admission or rejection of evidence, or any such as to the giving or refusal of instructions as would justify the reversal of the judgment.

The granting of leave to file additional pleas is within the discretion of the court. The refusal of leave to plead the statute of frauds is seldom held to be an abuse of discretion, and was not in this case.

We are not called upon to say that the preponderance of the evidence was with the plaintiff; we simply find that the verdict was not so manifestly opposed to the evidence that it must be set aside.

The judgment of the Circuit Court is affirmed.

69 48
75 379
69 48
79 228

John H. Hollst v. Charles Bruse et al.

1. CONCLUSIONS—*Statement that Defendant is Indebted to Plaintiff.*—A statement by a witness that the defendant is indebted to the plaintiff in a certain amount is a mere conclusion and will not support a judg-

Hollst v. Bruse.

ment in the plaintiff's favor. Such a conclusion should be supported by a narrative of facts.

2. APPELLATE COURT PRACTICE—*Reversal of Orders or Judgments*.—A motion was made to set aside a judgment, an appeal was allowed from an order overruling such motion and the bond recited an appeal from the judgment. *Held*, that whether the order should be reversed with directions to grant the motion, or the judgment be reversed, was but a question of form, and the latter course being the simplest was adopted.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

SAMUEL J. HOWE and B. M. MUNN, attorneys for appellant.

I. T. GREENACRE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. July 10, 1896, on an *ex parte* trial of an appeal from a justice, the appellees recovered a verdict and judgment against the appellant for \$146. During the term the appellant moved to set aside the judgment and verdict, and the bill of exceptions taken to the overruling of the motion recites that on that *ex parte* trial, "Allen C. Howes, being first duly sworn, testified: 'My name is Allen C. Howes; the defendants are indebted to the plaintiffs in the sum of \$146 for lumber sold by the plaintiffs and delivered for use upon the building of the defendant John H. Hollst,' which was all of the testimony heard on the trial of this cause."

The first point made in the motion was, "that the verdict was not supported by the evidence," which point was well taken.

The statement by the witness that "the defendants are indebted to the plaintiffs" is not of a fact, but of a mere conclusion. *Munson v. Farwell*, 16 Ill. App. 365.

That conclusion is supported by no narrative of facts. To whom the lumber was sold and delivered is not shown.

The motion should have been sustained.

The record states that the appeal was allowed from the

VOL. 69.]

Morehouse v. Fowler.

order overruling the motion, and the bond recites an appeal from the judgment. Had any objection been made to the bond, such objection could have been removed by amendment. Sec. 70 Practice Act.

The order was a final order, and it and the judgment were of the same term.

Whether we reverse the order with directions to grant the motion, or reverse the judgment, is but form, and the latter course, being the simplest we will adopt it, as was done in the case cited.

By reference to People v. Gary, 105 Ill. 264, it will be seen that in Munson v. Farwell the motion must have been denied several terms after the judgment was entered.

There is a probable conjecture that one Rose is a necessary party to this suit, under Sec. 29 of the Mechanic's Lien Act, or Sec. 37 of the act of 1874, and that it is now too late to bring him in, and the suit must fail.

The judgment is reversed and the cause remanded.

Cyrus S. Morehouse v. Allen Lester Fowler.

1. **PLEADING—*The Rule Requiring Certainty in Pleas Applied.***—The defendant in a suit brought by the assignee of a promissory note filed a plea alleging that he had executed a lease of certain premises to the payee of the note; that payment of part of the rent provided for had been released; that desiring to assign the lease as originally executed he had made the note sued on in consideration of an agreement of the payee to pay the rent provided for by the lease, and to perform its covenants; that the lease had been assigned; that the plaintiff knew these facts when he purchased the note, and that the payee had failed to pay the rent provided for by the lease or to perform its covenants. The plea failed to show that the lessee had notice to whom he should pay the rent or to state the nature of the covenants which he had failed to perform. *Held*, that the plea was uncertain and insufficient and that a demurrer was properly sustained.

2. **SAME—*Failure of Consideration Under the General Issue.***—In an action on a promissory note, where the common counts are contained in the declaration, if the note is read in evidence under the common counts, the defense of a want or failure of consideration may be shown under the general issue.

Morehouse v. Fowler.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This suit was commenced on the 10th day of January, A. D. 1896, by filing a præcipe in the Superior Court of Cook County.

On the 24th day of January, 1896, a declaration was filed containing a special count, in which was set out the instrument sued upon; also the common counts.

The instrument sued upon is as follows:

“\$350. CHICAGO, ILLINOIS, October 5, 1895.

January 1, 1896, after date, I promise to pay to Lucy E. Jordan, three hundred and fifty dollars, payable at Chicago, Illinois, value received.

C. S. MOREHOUSE.”

Indorsed on back of the note :

“Pay to the order of Allen Lester Fowler.

LUCY E. JORDAN.”

Wm. E. O'NEILL, attorney for appellant.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant filed a special plea, in effect, that July 31, 1895, he, as owner of the hotel Alabama, leased the same for \$350 per month; that afterward he agreed to temporarily reduce this rent to \$200 per month. That thereafter, while the lease was in force, he went to the lessees and agreed with them that if they would pay the person to whom he “was about to sell or had sold said premises,” the full amount of the rent, viz., \$350, and perform all other covenants in said lease, he would pay said lessees the sum of \$700; and thereupon, in consideration that said lessees would perform the covenants in the said lease mentioned, appellant executed two notes for \$350 each, one of which is the note in suit.

That said lessees have failed to perform the covenants of said lease, and have failed to pay the rent provided therein, as they agreed to do, by reason whereof the consideration of said note has wholly failed. All of which was known to the plaintiff when he purchased said note.

A special demurrer to this plea was sustained, and a judgment in the sum of \$351.17 entered for the plaintiff.

The sustaining of the demurrer to this plea is said to have been error.

The plea in question fails to show who the person is to whom appellant, as the plea states, sold the premises, or that the lessees had notice to whom they should pay the rent, and thus could pay. Nor does the plea set forth the covenants of the lease, and thus apprise the plaintiff of the nature of the covenants which the lessees failed to perform. The plaintiff was not a party to the lease or covenants, and consequently is not in this suit to be presumed to have notice of such covenants.

It is a fundamental rule of pleading, that a special plea in bar must be certain, and that whatever is alleged in pleading must be alleged with certainty. Stephens on Pleading, 9th Am. Ed., 132 and 384; Chitty on Pleading, 16th Am. Ed., Vol. 1, p. 560; 1 Saunders, 271, note 1.

Greater certainty is sometimes required in a plea in bar than in a declaration. As in debt or bond conditioned for the performance of several special things, the defendant pleaded "*performanit omnia,*" etc. Upon demurrer, this was adjudged insufficient, "for the particulars being expressed in the condition, he ought to plead each particularly by itself." Wimbledon v. Holdriss, 1 Lev. 303.

So in debt on bond conditioned for the payment of thirty pounds to H. S., J. S. and A. S., when they should come to the age of twenty-one years, the defendant pleaded that he paid those sums as they came of age; the plaintiff demurred because the plea did not set forth when they became of age and the certain times of payment; which demurrer was sustained because, as Lord Coke said, "he ought to plead in certainty the time, place and manner of the performance of

West Chicago St. R. R. Co. v. Reddy.

the condition, so that a certain issue may be taken." Halsey v. Carpenter, Cro. Jac. 359.

The plea under consideration gave to the plaintiff no information as to what the covenants were which the lessees had failed to perform; he was left in ignorance of what the issue was which he was called upon to join in and try.

Had issue been joined on this plea, it might have been held good after verdict. Chitty on Pleading, Vol. 1, 561, 16th Am. Ed.; Moore v. Jones, 16 Ld. Raymond, 1539; Baynon v. Battey, 8 Bing. 256.

The demurrer was properly sustained.

Where, in an action upon a promissory note, the common counts are contained in the declaration, if the note is read in evidence under the common counts, the defense of a want or total failure of consideration may be shown under the general issue. Wilson et al. v. King, 73 Ill. 232–236.

In the present case, the common counts were, with a special count upon the note, set forth in the declaration.

The proceedings upon the trial are not shown, there being no bill of exceptions.

For aught that appears, the note in question was offered and received in evidence only under the common counts, in which case the defendant could have shown that there had been a total failure of the consideration for which the note was given.

The judgment of the Circuit Court is affirmed.

West Chicago St. R. R. Co. v. Mamie Reddy.

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1. *CROSS-EXAMINATION—As to the Cause Producing a Particular Result.*—Where a witness has, expressly or by inference, stated the cause of a result, whether other causes contributed to the result, is a proper inquiry on cross-examination, and the fact that such inquiry relates to matters not pleasant to reveal, can not be considered.

2. *SAME—As to Details of Treatment by Physician.*—A physician testified that he had been the attending physician of a person suing for personal injuries from the time the injuries were received, and that he

VOL. 69.] West Chicago St. R. R. Co. v. Reddy.

had seen her over 200 times, and also stated facts relating to her condition at different times, and to his treatment. *Held*, that it was proper, on cross-examination, to ask what the whole treatment had been, and for what ailments.

3. APPELLATE COURT PRACTICE—*Citation of Authorities*.—This court will not usually make points not made by the appellant, but if a material point is made it will be considered, although it may not be supported by the citation of authorities.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CASE & HOGAN, attorneys for appellee; WILLIAM P. BLACK, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This is an action by the appellee for damages on account of personal injury.

Among the points urged for a reversal is, that the court refused to permit proper cross-examination of the appellee and her witness, as to other ailments than such as could have resulted from the injury complained of in this suit. Their examinations in chief, so far as relates to the question being considered, were for the manifest purpose of convincing the jury that what her physician called her "bad general condition," and for which he treated her for several months, was attributable to a cause for which she held the appellant responsible; and yet in cross-examining by neither of them was the appellant permitted to prove that her "bad general condition" was in any part attributable to causes for which the appellant was not responsible. The injury was December 3, 1892. The appellee testified that she returned to her work for six or seven weeks in the summer of 1894, and that was the only time she had worked since the injury; that she had tried to work about the house, but

West Chicago St. R. R. Co. v. Reddy.

was not able to. The appellee seems to claim that nothing occurring to her before or after the injury can be the subject of cross-examination, unless that thing had been specifically referred to in the direct examination, notwithstanding that the apparent purpose of such evidence in chief was to prove that her enfeebled health, after the injury, was wholly due to the particulars mentioned in such evidence in chief.

The rule is not so narrow. The appellee quotes from Hansen v. Miller, 145 Ill. 538, that "cross-examination of a witness should be confined to matters to which he has testified on his direct examination," and in the first case in which the question arose in this State, substantially the same language was used. Stafford v. Fargo, 35 Ill. 481.

But the same "matters" may be of particulars not alluded to before, as in Am. Ex. Co. v. Haggard, 37 Ill. 465, where a witness for the company having proved a custom of drivers, as to delivering parcels and getting receipts, was required to state the particular custom of one driver to steal.

There has been no occasion in this State to consider nicely the terms of the rule which are accurately stated by Greenleaf, Vol. 1, Sec. 445, as, "that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination." Where any witness has expressly, or by inference, stated the cause of a result, whether other causes contributed to the result, is a proper inquiry on cross-examination. Wilson v. Wager, 26 Mich. 452, is, in principle, in point.

Whether such inquiry relates to matter not pleasant to reveal is not to be considered.

The counsel of the appellee in their brief, calling attention to the fact that the appellant had cited no authority upon this point—though making the point—says: "We understand that under this rule (the rule of this court as to briefs) no questions of law are entitled to consideration which are not accompanied by 'the authorities in support thereof,'" which is in effect to say, that a good point, not supported by citation of authority, is to be overruled, however familiar to the court may be the law upon the subject.

VOL. 69.]Allan v. Foreman Brothers.

That the court will not usually make points not made by the appellant is true, but if a material point is made, the profession expects the court not only to pass upon the point, but to give a satisfactory reason for its decision; and very seldom, upon a question of general interest, is the reason given by the court, merely in the nature of a quotation from the brief of the counsel on either side.

Her physician had testified to many particular fractures and bruises of her person, that he had been her attending physician from about thirty-six hours after the injury to the time he was testifying, that about the end of two months she was in bad general condition, that for months he treated her for that with fairly good results; that as her physician, at her house or at his office, he had seen her, he thought, over 200 times.

Upon this the appellant was entitled, upon cross-examination, to know what the whole treatment had been, and for what ailments, as "facts and circumstances connected with the matters stated in" the direct examination. Such cross-examination would have been upon "the subject of the examination in chief." *Sullivan v. N. Y., L. E. & W. R. R.*, 175 Pa. St. 361; *Evans v. Murphy Varnish Co.*, 59 Ill. App. 87.

This error is fatal and it is unnecessary to consider other features of the case, which may never be presented again. *Lynch v. Free*, 66 N. W. Rep. (Minn.) 973.

The judgment is reversed and the cause remanded.

Eleanor A. Allan v. Foreman Brothers.

1. APPELLATE COURT PRACTICE—*Where no Exception was Taken to a Ruling of the Trial Court.*—Where an abstract filed in this court does not show that an exception was taken to the ruling of the trial court, which is complained of, the judgment will be affirmed.

Transcript, from a justice of the peace. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

North Chicago St. R. R. Co. v. Dudgeon.

J. EDWARDS FAY, attorney for appellant.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of court denying appellant's motion to set aside an order dismissing an appeal taken from a judgment rendered by a justice of the peace.

If Eleanor A. Allan had a complete defense to the whole of the said suit, no reason for her not filing an affidavit so stating, is perceived.

The abstract here filed does not show that any exception was taken to the ruling of the court below, and its order is affirmed.

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North Chicago St. R. R. Co. v. Frank G. Dudgeon.

1. FELLOW-SERVANTS—*Street Car Crews*.—A conductor on a street car is a fellow-servant of a gripman and another conductor who are in charge of another car in the same train.

2. NEGLIGENCE—*Of Independent Contractor*.—A street car company is not liable for injuries caused by the negligence of a contractor who was engaged in repairing the pavement in the part of the street used by it.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a conductor on a cable train of the appellant going north on North Clark street, at about nine

VOL. 69.] North Chicago St. R. R. Co. v. Dudgeon.

o'clock in the evening of October 20, 1892. The train consisted of a combination passenger and grip car, and one trailer. He had charge of the trailer, and another conductor, named Parker, had charge of the grip car, and the two, together with the gripman, constituted the crew of the train.

When the train reached a point near Ogden Front, it was met by another train going south with orders for the crew, of which appellee was one, to leave the north bound train and take charge of the south bound one. At such point, paving repairs were being made by appellant, through its contractors for that purpose—Farwell & O'Day—and a large amount of paving stones, gravel and other material for paving, was piled in the street alongside the railway tracks, rendering it difficult to get aboard the south bound train.

It became the duty, under his orders, for the appellee to take charge of the south bound trailer, which was an open, or summer car, with a foot-board extending along its entire sides. That south bound train was made up, as the north bound one was, of a combination grip car and one trailer.

To reach his car on the south bound train, which was the trailer, the appellee left the north bound train, and passed over the track, and in front of the grip car of the south bound train. He then walked along outside of the stone piles to a point opposite the rear of the south bound trailer, but finding it difficult, because of the stone piles, to board the car at that place, he retraced his steps toward the front end of the trailer, and there at a place where the stones were not piled so high and close to the car, and where there was room to step over the stones to the ground between them and the car, he stepped over and started to get on the foot-board of the trailer. He was carrying his register under his left arm, and took hold, with his right hand, of the handle on the front dash-board, and stepped upon the foot-board with his left foot. At that moment the train started forward and his hold was loosened and he fell, or was thrown, against the stones, and rolled back under the foot-board, which passed over him, lying lengthwise, its full length before the train could be stopped.

North Chicago St. R. R. Co. v. Dudgeon.

Either by the fall, or by the foot-board, or both, appellee was badly injured, and, probably, permanently so.

The record presents two controlling questions, both of which, under the evidence, must be decided against the appellee.

The first one is, was the accident due to the fault of a fellow-servant of appellee? It will not be denied that both the conductor of the grip car and the gripman were fellow-servants of the appellee. *Rolling Mill Co. v. Johnson*, 114 Ill. 57.

There was no contradiction of the testimony of the gripman that the conductor of his car told him to go ahead, and that he started the train because of such order.

The negligence in that regard, and it can not be claimed that appellee was thrown except by the starting of the train, was plainly the negligence of a fellow-servant of appellee, for which, under the law, the appellant is not liable.

But it is insisted that the appellant is liable because the proximate cause of the accident consisted in the stones being piled, as they were, alongside of the track. And the argument is that had the stones not been there, appellee having been, under the evidence, thrown away from the car, he would have rolled into the street instead of being forced back under the foot-board, by the stones, upon the principle that where the negligence of the master (in piling the stones in the street) is combined with the negligence of a fellow-servant in producing an injury, and neither is the efficient cause alone, the master as well as the servant is liable. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242.

Perhaps, considering the time at our disposal, it is enough in answer to that proposition to say that there is no evidence that the stones against which appellee was thrown, were placed there by, or belonged to, the appellant. The strong presumption is that they were put there by, and belonged to, Farwell & O'Day, who were independent contractors with the appellant to do the paving.

Under the evidence there can be no serious contention

but that Farwell & O'Day were independent contractors with the appellant for doing the paving, and that appellant's only concern with the job was to see that the work was done properly by the contractors. If appellant, and not Farwell & O'Day, owned the material, it lying in a public street, it was incumbent upon appellee to show it. Not having done so, we are bound to hold that the placing of the stones where they were was only subsidiary to the performance of the job undertaken by the contractors, and the city authorities not objecting to the stones being piled in the street, the appellant had no right to do so; nor was it a natural contingency which the appellant was required to anticipate or provide against.

The principle is clearly and elaborately laid down in C. C. Ry. Co. v. Hennessy, 16 Ill. App. 153.

There is but little, if anything, in the record upon which the judgment can stand, and it is therefore reversed and the cause remanded.

Maurice Weill v. P. H. Cornell.

1. EVIDENCE—*Objections to, Should be Specific.*—Specific objections should be made in the trial court to the introduction of evidence if the propriety of its introduction is to be questioned on appeal.

Assumpsit, on a contract of employment. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This is an appeal from a judgment against the appellant (defendant below) on a certain alleged contract of employment.

MARTIN J. ISAACS, attorney for appellant.

Conroy v. Townsend.

WILBER, ELDRIDGE & ALDEN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The principal contention of appellant is, that a witness was improperly permitted to testify to the contents of a written contract of employment.

Appellant's objection to such testimony was general only.

The objection should have been specific; the matter of the testimony was competent. Norton v. Dow, 5 Gil. 459; Swift v. Whitney, 20 Ill. 144; Wright v. Smith, 82 Ill. 527; Cox v. Gerkin, 38 Ill. App. 340; Conway v. Case, 22 Ill. 127.

The judgment of the Circuit Court is affirmed.

John W. Conroy and Nelson Spalding v. Barbara A. Townsend.

1. PLEADING—*Evidence Need Not be Stated.*—The facts, not the evidence of them, are to be stated in the declaration.

2. MALICIOUS PROSECUTION—*Signing Complaint Not Necessary.*—Two may join in charging a person with crime, though but one sign the complaint.

3. SAME—*Identity of Plaintiff and Person Prosecuted.*—Whether a person suing for malicious prosecution was the person against whom the prosecution was directed, is matter of evidence, whatever may be the name in the complaint and warrant.

TRESPASS ON THE CASE, for malicious prosecution. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

B. M. SHAFFNER, attorney for appellants.

EDWARD H. MORRIS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The real question here is, whether the appellants maliciously, and without probable cause, prosecuted the appellee

VOL. 69.] Mantonya v. Martin Emerich Outfitting Co.

upon a charge that she had threatened to kill, and to do great bodily injury to the appellant Spalding.

The language of the declaration as to their joint action is, that they, before a justice, "charged" her with the offense. The evidence on her part was that the appellants were together at the office of the justice—that Spalding swore to the complaint—that Conroy gave the warrant thereon and a dollar to the constable, and went with him and pointed out the appellee as the person to be arrested. In the complaint and warrant Mrs. J. Pointer was designated as the person against whom the prosecution was directed, by which name of Pointer the appellee was often called, having had a former husband of that name.

In all this there is no variance. The facts, not the evidence of them, are to be stated in the declaration.

Two may join in charging a person with crime, though but one sign the complaint. 14 Am. & Eng. Ency. of Law, 38.

Whether the appellee was the person against whom the prosecution was directed was matter of evidence, whatever the name in the complaint and warrant.

If the jury paid any attention to the voluminous instructions they had a fair presentation of all the law applicable to the case before them as a guide, and it is unnecessary to spend time and occupy space upon a subject so familiar.

The evidence was conflicting. If any of it was to be believed, the jury were to determine what. The damages, \$300, are not extravagant for a case where a woman is plaintiff in an action in which vindictive damages may be awarded. The judgment is affirmed.

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Lucius B. Mantonya v. Martin Emerich Outfitting Co.

1. CHATTEL MORTGAGES—*For Purchase Money.*—The section of the statute providing that no chattel mortgage executed by a married man or woman, on household goods, shall be valid unless joined in by the husband or wife, has no application to a mortgage to secure the purchase money of the goods upon which it is given.

Mantonya v. Martin Emerich Outfitting Co.

2. **MEASURE OF DAMAGES—*In Suit by Mortgagee for Wrongful Conversion.***—The measure of damages in an action of trover, brought by a mortgagee, is the amount of the mortgage lien not exceeding the value of the property.

3. **EVIDENCE—*Mortgages Admissible to Show Amount Due.***--A chattel mortgage may be considered as evidence of the amount Due from the mortgagor to the mortgagee.

Trover, for the wrongful taking of property under a distress warrant. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

RICH & STONE and LEON L. LOEHR, attorneys for appellant.

MYER S. EMERICH, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case is presented the question whether a married woman, her husband not joining, can make a valid chattel mortgage of household furniture to secure the vendor of the same for the purchase price.

This question has been affirmatively answered in an opinion reported in 58 Ill. App. 268, Paterson v. Higgins.

Appellant having, under a distress warrant, seized the property in question, the measure of damages in an action of trover brought against him by the mortgagee is the amount of the mortgage lien not exceeding the value of the property. Sedgwick on Dams., 8th Ed., Vol. 1, Sec. 82, note e; Sutherland on Dams., 2d Ed., Sec. 139; David v. Bradley, 79 Ill. 316.

The court, therefore, ought not to have given the first instruction asked by the plaintiff, which is as follows:

“If the jury from the evidence, under the instructions of the court, find the defendant guilty, then they may assess the plaintiff's damages at the value of the property at the time the demand was made; if the jury find from the evidence a demand was made with interest thereon, at the rate of five per cent per annum from that time.”

It is urged that there was no evidence of the amount of the plaintiff's lien, as it is said that the notes secured by the chattel mortgage were not offered in evidence; yet appellant in the court below moved for a new trial because, as he said, "the court admitted improper evidence, that is to say, a certain chattel mortgage" "and the notes which said mortgage was given to secure."

In an action for trespass for an alleged unlawful entry upon real property by a mortgagee, the mortgage alone, without the production of the notes secured thereby, is admissible in justification of the entry. *Smith v. Johns*, 3 Gray (Mass.) 517.

The plaintiff in the present case has recovered only \$275. The property taken was shown to be worth \$600.

The mortgage recites that it is given to secure an indebtedness of \$625. There is no evidence that more than \$150 has been paid thereon, or that any of the secured notes have been assigned.

We see no reason for thinking that injustice has been done, nor do we find any such error as requires a reversal of the judgment; it is therefore affirmed.

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Pittsburg, C., C. & St. L. Ry. Co. v. Walter T. Haley, by his Next Friend.

1. INFANTS—*Not Bound by Compromise of Suit*.—An infant is not bound by his agreement to compromise or to refer to arbitration, or by an award or judgment made under such an agreement.

2. SAME—*Suits by Next Friend*.—An infant is not considered as having sufficient discretion to conduct a suit in person; suit is therefore brought in his name by his guardian or next friend, but the next friend is regarded as an officer of the court, and is subject to direction or removal by the court.

3. SAME—*Authority of a Next Friend*.—No one can admit away the rights of an infant, and a next friend can not compromise or settle a claim for which suit is brought.

4. JUDGMENTS—*Recitals in*.—The recital "after hearing the evidence" is not such a record as will conclusively show as against a minor

P., C., C. & St. L. Ry. Co. v. Haley.

that the case was decided from a consideration of the facts. The recital may be entirely true and yet not include matters essential to a full hearing and an intelligent judgment as to the rights of a party, and will not operate to prevent a vacation of the judgment on a proper showing.

Bill, to set aside a judgment. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1896.

STATEMENT OF THE CASE.

This was a bill filed April 16, 1895, by appellees to set aside a judgment entered for \$125, July 17, 1885, in a suit in the Circuit Court of Cook County.

The bill charges substantially as follows, to wit:

1. That on or about the 26th day of May, 1885, in a public highway, the complainant had his right leg cut off through and by the negligence of the defendant.
2. That on or about the 6th day of July, 1893, in the Superior Court he brought suit by Sarah J. Haley, his next friend, against the defendant for damages.
3. That during the progress of said suit he discovered that defendant claims that the matters in issue have been settled, compromised and satisfied by a certain suit at law and judgment entered therein in the Circuit Court of Cook County, on the 17th day of July, 1885, the files and records of which said cause are made a part of this bill.
4. That said suit was brought without his knowledge or consent, or the knowledge or consent of his next friend or other person authorized to act for him, and that, by agreement of the attorneys for the respective parties, a judgment was entered therein.
5. That said suit was wholly unauthorized by complainant, and the judgment and satisfaction thereof unknown to him and in fraud of his rights and by collusion between an attorney and the defendant therein.
6. That at the time said compromised suit was brought, said attorney and the defendant were aware that the defendant was liable, and he and said defendant conspired together

to defeat and defraud the complainant, and fictitiously brought the suit in the name of said attorney; whereas, in fact and in truth, said attorney was the attorney and agent of the defendant.

Prayer that the judgment and proceedings may be opened and reviewed and declared null and void and not binding on the rights of complainant.

The answer, in substance, denied all fraud and collusion and all improper proceeding and practice. Evidence was heard and the court found *inter alia* that in the former suit, "without the hearing of any evidence, but upon the agreement of the counsel for the respective parties a judgment was entered by the court without a jury, in favor of the plaintiff for \$125."

GEO. WILLARD, attorney for appellant.

CASE & HOGAN, attorneys for appellee; A. W. BROWNE, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We do not think that the evidence shows that the judgment was fraudulently obtained, nor did the court below so find. None of the witnesses testified that the judgment was entered without the hearing of any evidence, although the court so found.

As to whether the court heard evidence, there was no testimony. It does appear from the evidence that there was an agreement between the counsel for the respective parties that a judgment for \$125 should be entered for the plaintiff. The next friend, by whom the suit was brought, denies that she agreed to this, and denies also that when she received the money she knew that it was paid under such judgment.

Two witnesses contradicted her as to this.

We do not think that the weight to be given the recital in the record of the judgment that the court "after hearing

P., C., C. & St. L. Ry. Co. v. Haley.

the evidence" found the defendant guilty, was overcome by the testimony in the present case.

The testimony shows that a trial by jury was waived; that the amount of the recovery had been agreed upon before the hearing; that only the sum of \$125 was asked for, and that a recovery for that sum not being contested, judgment for such amount was entered.

The preponderance of the evidence is that the next friend of the infant, his mother, and the defendant, agreed that a judgment for \$125 should be entered, and that the judgment was the result of such agreement, and not of any contest or hearing of evidence in court.

An infant is not bound by his agreement to compromise, or to refer to arbitration, or the result of an award made thereunder. *Baker v. Lovett*, 6 Mass. 78; *Wainwright v. Kelly*, 62 Md. 146.

An infant is not considered as having sufficient discretion to conduct a suit in person; suit is therefore brought in his name by his guardian or next friend. Am. & Eng. Ency. of Law, Vol. 10, p. 679.

The next friend is regarded as an officer of court, and is subject to, and may be removed by, the court.

No one, neither guardian nor next friend, can admit away the rights of an infant. *Chudleigh v. C., R. I. & P. Ry. Co.*, 51 Ill. App. 491; *C., R. I. & P. R. R. Co. v. Kennedy*, 70 Ill. 350–364; *A., T. & S. F. Ry. Co. v. Elder*, 50 Ill. App. 276; *Hitt v. Ormsbee*, 12 Ill. 166; *Lloyd v. Kirkwood*, 112 Ill. 329.

The next friend can not compromise or settle the claim for which suit is brought. *Tripp v. Gifford*, 29 N. E. 208; 155 Mass. 108.

Undoubtedly he may negotiate for a settlement, but to actually make one which will bind the infant, he has no power.

While, before the judgment under consideration was had, the form of a judicial contest, hearing and determination were gone through, yet it is evident that these were formal, only. Practically, the judgment was a result of a compromise made by the next friend and the defendant.

The recital, "after hearing the evidence," is not such a record as in view of what is shown in the present case, makes the judgment conclusive. The recital may be entirely true, and yet cover very little, nothing essential to a full hearing and an intelligent judgment as to the rights of the plaintiff.

As the infant does not appear to have received the benefit of the money paid, the question of his obligation to return the same before having the judgment under which it was paid set aside, does not arise.

The decree of the Superior Court setting aside such judgment is therefore affirmed.

Emelie Groth v. Heinrich Groth.

1. **ALIMONY—*Can Not be Allowed to a Husband.***--There is no law in this State authorizing the allowance of alimony to a husband.

Bill for Divorce, and alimony. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Order reversed. Opinion filed March 8, 1897.

J. C. RICHLBERG, attorney for appellant.

JOHN H. RONEY and FRANK F. ARING, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant filed a bill to obtain a divorce from the appellee. The court ordered that she should pay him \$20 per month, temporary alimony, and \$25 solicitor's fees, from which order is this appeal. We do not review the cause shown on which such order was made, being of the opinion that if alimony from a wife to a husband is a proper thing upon circumstances, legislation is necessary to authorize it.

Chicago City Ry. Co. v. Smith.

At common law a husband was required to provide his wife with necessaries, but there was no reciprocal duty.

The statute gives her—not him—alimony. To give it to him is not to administer existing, but to make new, law. *Somers v. Somers*, 39 Kan. 132. *Green v. Green*, 68 N. W. Rep. (Neb.) 947.

The order is reversed.

Chicago City Ry. Co. v. Bessie L. Smith.

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1. **EVIDENCE—Opinion on Matters of Common Knowledge.**—The opinions of experts—persons instructed by experience—are in many cases admissible as evidence, but not when the inquiry is into a subject-matter, the nature of which does not require any peculiar habits or study, or scientific knowledge to understand it.

2. **SAME—Opinions of Experts in Cases Where the Facts can be Ascertained.**—The opinions of witnesses should not be received as evidence where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

Wm. J. HYNES and Jas. W. DUNCAN, attorneys for appellant.

LORENZO E. Dow and CHARLES A. ALLEN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action for personal injury, received under circumstances, the appellee's version of which is sufficiently indicated by a question on her behalf, to which an exception was taken by the appellant, as follows:

“Doctor, assuming that on the 7th day of February, 1892, the plaintiff was riding in a cart drawn by a horse and crossing State street at the intersection of State street

VOL. 69.]Chicago City Ry. Co. v. Smith.

and Garfield boulevard, in this city, and that the cart in which she was then riding was run into by a cable train and carried a distance of from 225 to 240 feet, the top of that cart having been torn by this cable train, the cart upset and the top, with the plaintiff and another lady in it, was shoved that distance before stopping, would such a state of facts, in your opinion, cause the injury which you have found in the plaintiff?"

The witness answered: "I should consider it might produce those conditions."

The opinions of experts—persons "instructed by experience"—are in many cases admissible as evidence, but not "when the inquiry is into a subject-matter, the nature of which does not require any peculiar habits or study, or scientific knowledge, to understand it." *Linn v. Sigsbee*, 67 Ill. 75.

"The opinions of witnesses should not be received as evidence, where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury." *City of Chicago v. McGiven*, 78 Ill. 347; *National Gas, etc., v. Miethke*, 35 Ill. App. 629, collects many cases, and *Lawson on Expert and Opinion Evidence*, 195, many more.

Now, recurring to the terms of the question, what experience did any man ever have of such events as are there stated? That with a hypothetical statement of the wounds, bruises, etc., upon the person of a sufferer, a physician and surgeon may express an opinion as to effects, is not to the purpose; it does not follow that the physician and surgeon is an expert as to what contusions may happen to a man rolled over by a saw-log, or kicked by a mule. The absurdity of the question is most easily shown by analyzing it. Was it material that the day was February 7, 1892; that she was in a cart or buggy; drawn by one or two horses, etc.?

The appellee was, in fact, riding in a cart drawn by a horse which was driven by another lady; and a very material question was whether that other lady carelessly drove

Chicago City Ry. Co. v. Smith.

in front of the car. There could be no question as to care by the appellee herself, for she only sat still. One of the instructions for the appellee was:

“If the jury believe from the evidence in this case that on or about the 7th day of February, 1892, the plaintiff was riding in a cart at or near the intersection of State street and Garfield boulevard, in the city of Chicago, State of Illinois, and then and there using all due care and caution, and while so riding the said cart collided with and was struck by a train of cars propelled by cable power belonging to and operated by the defendant, and that such collision was caused by negligence and carelessness of defendant’s servants in the management and operation of said train of cars, as charged in plaintiff’s declaration, then the jury should find the defendant guilty and assess plaintiff’s damages at such sum as the jury believes from the evidence she has sustained by reason of the collision.”

That instruction may perhaps be justified in theory, because the old cases holding that one injured by the concurrent negligence of two carriers, by one of which he was being conveyed, had no remedy against the other, are not now authority; Chicago City Ry. v. Wilcox, 33 Ill. App., 450; and therefore if the lady driving was careless, yet if the appellant was also careless, the remedy of the appellee against the appellant would not be barred by the contributory carelessness of the driver. Practically, however, the instruction put the conduct of the appellee in contrast with that of the appellant, and implied that if she was not careless, it was, and in that way was misleading.

In this class of cases there is little need that the plaintiff should take chances. Happily, in this case, we have no complaint of the conduct of counsel to review; the case seems to have been tried as a law suit in which the judgments, and not the prejudices, of the jurors were appealed to. But with the cases cited from 67 and 78 Ill. before us, we can not overlook the error committed in admitting this so-called expert testimony.

Nor can we treat the error as harmless upon the proba-

VOL. 69.] Continental Investment & Loan Society v. McKay.

bility that the jurors would have agreed with the witness had the conclusion been left to them. A vital question in the case was, whether her alleged bad physical condition was the result of the collision. There was much testimony that she arose therefrom unharmed.

We need not consider other questions.

The judgment is reversed and the cause remanded.

Continental Investment and Loan Society v. Aaron M. McKay.

1. **APPEALS—Effect of, on Receivership Proceedings.**—When an appeal from a decree appointing a receiver for a corporation is perfected, such appeal becomes, in effect, a supersedeas, and operates to prevent any distribution or application by the trial court of the assets of the corporation.

Bill for Receiver and Dissolution of a Corporation.—Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed March 8, 1897.

DEFREES, BRACE & RITTER, attorneys for appellant.

M. SALOMON, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In a proceeding before the auditor of public accounts, for the purpose of dissolving the appellant society and distributing its assets, by virtue of the provisions of the act relating to homestead loan associations, the Circuit Court, on March 18, 1896, entered an order as follows:

“This day came the parties hereto by their respective solicitors, and thereupon came on to be heard the motion for a receiver herein, and the court having heard the arguments of counsel, and in order to have the court more fully

Continental Investment & Loan Society v. McKay.

advised in the premises, it is ordered that Aaron M. McKay be and he is hereby appointed to investigate the affairs of said defendant association, and report to the court his findings as to its condition, the value of its real estate loans and security.

It is further ordered that the officers of said association render all the assistance within their power to said Aaron M. McKay."

In pursuance of such order, the appellee, who is the person named therein, made an exhaustive investigation, and followed it by an elaborate report, which was filed in the cause on April 8, 1896, and bears evidence on its face of possessing much value in such a proceeding.

Before such order was entered, a master in chancery had made and filed a report in the cause, which was presumably the basis for the application for the appointment of a receiver, which the order refers to.

On the same day that appellee's report was filed, April 8, 1896, a final decree was entered in the cause, approving the master's report, decreeing a dissolution of the appellant corporation, appointing a receiver of its assets, and directing a distribution thereof to the creditors and stockholders; and from such decree the corporation appealed to the Supreme Court, and on the same day perfected its said appeal by filing an appeal bond as required by the order allowing the appeal, and procured the approval thereof by the court.

The decree so appealed from made no provision for compensation to the appellee, and none had been made theretofore. Probably the effect of the final decree, entered April 8th, ordering a dissolution of the corporation and distribution of its assets, appointing a receiver and directing the delivery of its assets to him, operated as an injunction against its officers from paying out any funds belonging to the corporation, except by a delivery thereof to the receiver, although no express injunctive order appears to have been made. At all events, the court seems to have considered that there was some order of injunction in force, for on May 16, 1896, it was ordered by the court, "that the injunc-

VOL. 69.] Continental Investment & Loan Society v. McKay.

tion heretofore issued be and it is hereby construed not to apply to the payment of fees of Aaron M. McKay, the expert appointed to examine the books of the defendant."

The first time, so far as the record shows, that any application for fees to be paid to the appellee was made, was on August 8, 1896, when this decree, which is the subject of this appeal, was entered.

As abstracted, such decree was as follows:

"The case came on to be heard upon the motion of Aaron M. McKay; that the court fix compensation for services rendered by him under the appointment of the court on March 18, 1896; that counsel for the people and the defendant society appeared; that the court heard evidence, including the report of McKay, heretofore made a part of the record in said cause; that the court finds from the evidence that a reasonable compensation for McKay for services rendered is \$500; that his appointment was made without objection for the purpose specified in the order.

It is therefore ordered, adjudged and decreed by the court, that Aaron M. McKay do have and recover from the Continental Investment and Loan Society the sum of \$500; that said company be required to pay same within ten days from this date, and in default thereof that execution issue."

The question is, was such decree proper in the then condition of the case?

Although inartificially drawn, and in form like a judgment at common law—"do have and recover," etc., and ordering execution—the meaning of the decree is to subtract from the funds of the corporation, the sum of \$500, the right to do which depends wholly upon the determination of the appeal taken to, and perfected in, the Supreme Court, April 8, 1896, four months before this decree was entered.

That former appeal took the cause out of the jurisdiction of the Circuit Court, so far, at least, as to prevent any distribution or application by it of the assets of the corporation under the provisions of the statute is concerned. *Harris v. The People*, 66 Ill. App. 306.

Glos et al. v. Hewes.

The services of appellee were rendered in the very proceedings which culminated in the decree of April 8th, and were a subject for consideration in that decree, but not having been there considered nor reserved, the Circuit Court was without jurisdiction after the appeal to the Supreme Court had been perfected and before the determination thereof, to make such a further decree. It was done improvidently and without jurisdiction while the main decree was pending in the Supreme Court. It will be time enough for the Circuit Court to make a further order concerning the matter after the appeal remaining in the Supreme Court shall be disposed of.

The decree is reversed, but without precluding the Circuit Court from considering the matter again after the Supreme Court shall have acted. Reversed.

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170 ^s	43 ^s
69	75
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Jacob Glos, Philip Knopf, County Clerk, and D. H. Kochersperger, County Treasurer, v. Henry J. Hewes.

1. **EVIDENCE—Of Title to Land.**—A warranty deed from a person in whom no title is shown is not sufficient to prove the ownership of land in a suit in chancery where the answer denies the allegations of the bill, even though the allegation as to ownership is not specifically contested.

2. **EQUITY PLEADING—Facts not Admitted are in Issue.**—In chancery everything alleged in the bill, and not admitted by pleadings of the defendant, is in issue.

Bill for an Injunction. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the October term, 1896. Reversed and bill dismissed. Opinion filed March 8, 1897.

ENOCH J. PRICE, attorney for appellants.

MASTERS & HAFT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

In *Hewes v. Village of Winnetka*, 60 Ill. App. 654, is reported a former decision of this court upon the subject-matter of the present controversy.

The appellee in his brief now says:

"This is not a bill to cancel or set aside a deed to Glos, or even to set aside the certificate of sale issued to him, but the bill is filed for the purpose of obtaining an injunction restraining the county clerk or treasurer from taking any further proceedings to enforce the special assessments in question, and more especially restraining them from issuing deeds to appellant Glos and his brother tax sharks;" which we infer was intended, partly, to express disapprobation of Glos.

The bill alleges that the appellee, on the 9th day of March, A. D. 1891, was, and since then has been, the owner in fee simple of the following described real estate, to wit: Lots 1 to 16 inclusive, in blocks 1, 2, 3, 6, 7, 8, and lots 1 to 18, inclusive, in blocks 4 and 5, all in the Winnetka Land Association subdivision of the N. $\frac{1}{2}$ of the W. 90 acres of the N. W. $\frac{1}{4}$, section 20, township 42 north, range 13 east of the 3d P. M., in Cook county, Illinois; and to prove that allegation, the appellee put in evidence a warranty deed from William M. Craig and wife conveying to Henry J. Hewes the north 45 acres of the west 90 acres of the northwest quarter of section 20, township 42 north, range 13 east of the third principal meridian, subject to certain incumbrances therein named, dated March 9, 1891, and acknowledged by the grantors on May 4, 1891, and recorded in the recorder's office of Cook county on May 5, 1891.

No other evidence relating to title or possession was put in.

It is true that in *Gage v. Parker*, 103 Ill. 528, where the decree was reversed for other errors, the court said that the title was not a mooted question in the case, and that the testimony of the party that he bought the property with his own money, in connection with the deed to him, might be regarded as sufficient. Such a case is not enough to overturn settled law; nor do we regard the position of the appellee, that under the statute a deed from one in whom no title is shown is *prima facie* evidence of title, as well taken.

Chicago City Ry. Co. v. Gregg.

In chancery everything alleged in the bill, and not admitted by pleadings of defendant, is in issue. Bachmann v. Supreme Lodge, 44 Ill. App. 188.

Twice the general public, at considerable cost, have held open to the appellee an opportunity for the redress of his grievances. On the case made by him on his last effort, his bill should have been dismissed. The decree in his favor is wrong, and it is reversed and the bill dismissed here, at the cost of appellee.

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107 226

Chicago City Railway Company v. Minnie Gregg.

1. EVIDENCE—*Of Wrongs Not Alleged in Declaration.*—In an action based on the alleged negligence of the defendant in operating a street car, it is error to admit evidence of wrongs the plaintiff afterward suffered at a hospital, such wrongs not being stated in the declaration.

2. STREET RAILROADS—*Sudden Starting of a Car.*—If a passenger attempts to alight from a car on a street railroad, without any notice to the servants of the railroad corporation, in charge of the car, and without their knowing or being negligent in not knowing that he is doing so, the corporation is not liable for injuries received by him through a fall occasioned by a sudden starting of the car during his attempt.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This action was brought by Minnie Gregg, appellee, against the Chicago City Railway, appellant, to recover damages for personal injuries. The jury rendered a verdict in favor of appellee for \$7,500, from which the sum of \$2,500 was remitted, and judgment entered for \$5,000.

The original declaration alleged that appellant “owned and operated a certain street railway along and upon 39th street and Wentworth avenue and 41st street,” etc.; that appellee entered one of appellant’s cars for the purpose of

VOL. 69.]Chicago City Ry. Co. v. Gregg.

going to "Atlantic street and 41st street," and that the accident occurred "at or near Atlantic street and 41st street."

During the trial leave was granted appellee to file an amendment to her declaration. The amendment was made by erasing the figures "41st" in two places in the original declaration, and interlining "Root." Afterward, the court directed that appellee file her amendment in proper form, and that "the original declaration be restored as it was."

Appellee, however, failed to obey this order and file an amendment.

WILLIAM J. HYNES, attorney for appellant.

JNO. F. WATERS and HIRAM BLAISDELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee was the only witness who testified in her behalf to the circumstances under which the accident happened.

She testified, in chief, that, having signaled the car to stop, as it was going at a slow walk, and she was attempting to get off from the platform, the car gave a sudden jerk and threw her to the ground. Upon cross-examination, she testified that the car stopped before she got off, but not long enough for her to get off in safety.

In rebuttal she testified:

"Q. At the time you got off the car was the car at a standstill, or was it moving? A. It was moving toward a standstill, but didn't stop at all to let me off in safety. That is the truth from beginning to end, and that was my intention the other day to testify and get my testimony in within that very shape.

Q. What did you mean when you said that the car stopped? A. I didn't mean that it stopped entirely; that it was approaching toward a standstill, and while attempt-

Chicago City Ry. Co. v. Gregg.

ing to get off from the foot-board to the ground, the car suddenly jerked. I, at that time, had my hand on the seat, and the sudden jerk wrenched my hand from the seat, and I fell forward."

The only negligence alleged, and that to which she testified, was a sudden jerk of the car.

The car was what is known as an open or summer car.

Three passengers, none of them employes of the company, testified that there was no jerking of the car. The conductor and driver of the car testified to the same effect.

The very great preponderance of the evidence is, that the accident was not due to any negligence charged in the declaration. N. C. Street Ry. Co. v. Lotz, 44 Ill. App. 78.

Counsel for the plaintiff in his opening statement charged that appellee, having gone to the county hospital, through the connivance and procurement of the defendant and its agents, was there starved for four days.

The plaintiff, upon the promise of her counsel to connect the defendant therewith, was permitted to testify what was said and done to her by the attendants of the county hospital; that she was deprived of all solid food for four days; that she received nothing but a pint of milk three times a day; that she told them if they could not do any better, she wanted to go home, and they refused to let her have her clothes; that she asked them if they were going to do anything for her, and if not, to let her go home, as she at least could use liniment and give herself a little ease; that there was nothing being done for her there; that in place of giving her her clothes, she was transferred to ward No. 7, where she was placed in bed and kept there six days without any medical treatment; that she was kept costive for four days.

Many questions were then asked her by her counsel, in an endeavor to show that such treatment was due to the agency of the defendant, and that while at the county hospital an attempt had been made by appellant to effect with her a settlement of her claim.

Such attempt to connect the defendant with anything

done at the county hospital, it is conceded (it is said, owing to objections interposed by the defendant,) was a failure.

The testimony of appellee as to the manner in which she was treated in the county hospital, the court "struck out."

It should never have been admitted. Plaintiff's declaration contained no complaint of ill treatment at the county hospital, or any allusion to her having been there. The admission of such testimony could have but one tendency, viz., to prejudice the jury against the defendant, charged by counsel to have procured such ill usage. It is impossible to say how much the jury may have been influenced by the entirely unjustifiable accusation by counsel and the utterly immaterial testimony of the plaintiff to wrongs which, if suffered, she could not recover for in this action.

Even had counsel succeeded in showing, as he told the court and jury he would, that the defendant had induced the attendants at the county hospital to starve his client, the evidence would have been inadmissible. The plaintiff had brought an action based upon the alleged negligence of the defendant in operating a horse car on Root street near Atlantic; for this, and nothing besides. The defense was a denial of such negligence, and nothing else.

What wrongs the plaintiff afterward endured at the county hospital might be the subject of a separate suit, but were not even hinted at in her declaration in this case.

According to her own testimony, she attempted to get off while the car was moving toward a standstill; it does not appear that any servant of the appellant knew of her movement. She had signaled the car to stop; this it was proceeding to do, when she, without waiting for it to come to a stand, attempted to get off from the foot-board to the ground. Unless some agent of the company knew that she was so doing, the sudden jerk of the car can not be said to have been a negligent act. C. W. Division Ry. Co. v. Mills, 91 Ill. 39; Nichols v. Middlesex Ry. Co., 106 Mass. 463; North Chicago Street Ry. Co. v. Lotz, 44 Ill. App. 78.

Her injury was the result of what she was then, without notice to the company, doing; for the signal to stop was

Kane v. Kinnare.

not notice that she would attempt to get off without waiting for the car to stop.

No other of the dozen passengers was thrown down or injured by the "sudden jerk," if one there was.

The judgment of the Superior Court is reversed, and the cause remanded.

Katherine J. Kane v. Frank J. Kinnare, Adm'r, etc.

1. PRACTICE—*Remarks by the Court During Trial.*—It is not proper for a court to make remarks, in the hearing of the jury, calculated to influence their finding, and if it is probable that such remarks may have worked injury to an appellant, the judgment will be reversed.

Petition, in probate. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

J. WARREN PEASE and HILLIS & M'COX, attorneys for appellant.

CHARLES L. MAHONY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the administrator of the estate of Jane Kneafsey, deceased. This case was tried by a jury in the Circuit Court on appeal from the Probate Court. The question was whether the appellant or one Archibald Russell Orr was next of kin, or among the next of kin, of the deceased. Both could not be, as each traced, or endeavored to trace, the deceased to a different origin and family.

We say endeavored to trace, for the reason that the evidence on either side is very far from being satisfactory.

The appellant was a witness—and a very important witness—for herself.

The appellee put in evidence two photographs, as of the

VOL. 69.]Kane v. Kinnare.

deceased—one, "B," representing an older woman than the other, "C." On cross-examination of the appellant with reference to the deceased, the following occurred :

"Q. How many times did you meet her in Mrs. Conroy's house? A. I used to meet her in the evenings.

Q. How many times did you meet her in all your life? A. I suppose in all my life—

The Court: Do your best.

A. I think I met her about thirty times altogether.

Q. Do you identify the photograph of Jane Kneafsey; say whether that is a photograph of her or not? Plaintiff's Ex. C? A. No.

Q. Can you tell from looking at that photograph whose photograph that is? A. No, I never seen that.

Q. You never saw the woman whose photograph that is? A. I have seen the woman, but never the photograph.

Q. I will ask you if you know any woman whose photograph you believe that is? A. Probably it might be hers, but I never seen that.

Q. Can you say it is hers or not?

The Court: You don't state anything anybody can understand. I am not going to let you waste time talking about nothing.

Mr. Pease: I except to the remarks of the court.

The Court: She doesn't answer any questions. If she has any claim she has to state it so that we can understand her.

Mr. Pease: I except to the remarks of the court.

The Court: She talks and talks, but I can't see that anything she has said is evidence in this case.

Mr. Pease: I except to the remarks of the court.

A. Probably it might be hers, but I never seen it.

Q. Do you believe that is a photograph of the Jane Kneafsey that you know?

The Court: Do you think it is?

A. Well, I think it is.

Q. Look at this photograph and say whether you ever saw that before, Plaintiff's Ex. B? A. I think that is hers too."

Hanchet v. Ives.

It is not improbable that the jury could not, from the evidence, have given any satisfactory reason for believing that either of the contestants were of kin to the deceased, and yet would have assumed, from the mere fact of the controversy, that if one of them was not so of kin, the other was.

Now the effect of the interruptions by the court, on the cross-examination of the appellant, was to discredit her before the jury as a witness. The jury might easily have adopted the inability of the court to see "that anything she has said is evidence in this case," although she had traced to the deceased her own relationship of niece, and had testified to acknowledgments of that relationship by the deceased.

The appellant is entitled to a trial at which her testimony shall be impartially considered by the jury.

One of the greatest difficulties of a *nisi prius* judge is to keep his mouth shut. I had twenty-five years experience of it. Skelly v. Boland, 78 Ill. 438; Chicago & Eastern R. R. v. Holland, 122 Ill. 461.

Many judgments have been reversed in this State because the judge talked too much. The cases may readily be found by consulting the digests.

The judgment of the Circuit Court is reversed and the cause remanded to that court.

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**Seth F. Hanchet, Sheriff, et al. v. Joseph F. Ives,
use, etc.**

1. **WAIVER—Of Defects in Pleading.**—By pleading over by filing a rejoinder, all questions of law arising upon a replication are waived.
2. **AVERMENTS—Not Traversable.**—An averment that a suit is brought for the use of another is not traversable.
3. **FINDING OF THE COURT—Upon Conflicting Evidence.**—The finding of the court upon conflicting evidence is ordinarily final.
4. **JURIES—Waiver of, by Agreement.**—The parties to a suit made a stipulation that the cause, should be submitted to and heard by the court.

VOL. 69.]Hanchet v. Ives.

Thereafter, a new replication and pleadings subsequent thereto were filed, and one of the parties then demanded a trial by jury which was refused. *Held* that this was proper as the "cause," and not the cause upon "issues joined," was submitted.

Trespass.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

E. F. ABBOTT and G. W. & J. T. KRETZINGER, attorneys for appellants; M. F. GALLAGHER, of counsel.

OLIVER & MECARTNEY, and SIMMONS & WINSTON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case, under the same title, has been in this court and in the Supreme Court heretofore. 33 Ill. App. 471; 133 Ill. 332.

When the case returned to the Superior Court the parties made a stipulation that the "cause" should "be submitted to and heard by his honor Judge Stein." Thereafter a new replication, with pleadings subsequent thereto, was filed, and the appellants then demanded a trial by jury. Being refused, they excepted. In this was no error. Here the "cause," and not the cause upon "issues joined," was submitted. *Gage v. Com. Nat. Bank*, 86 Ill. 371; *Heacock v. Lubukee*, 108 Ill. 641.

The new replication was an amplification of the previous one, the substance of which is stated in 133 Ill. 333-4; and upon rejoinders and surrejoinders, the parties got to a basket full of issues of fact.

The validity of the first replication was not passed upon by the Supreme Court.

Several issues of fact are also joined upon pleadings following that replication.

One of the rejoinders to the new replication was that the agreement in that replication stated was made more than five years before that replication was filed.

To that rejoinder a demurrer was rightly sustained. This

Baker v. Clancy.

action of trespass is not grounded upon any right acquired by that agreement. The appellee had possession—the appellants took it from him, and must justify.

The agreement, if valid, only destroys the justification. And the validity of the agreement is not now in question. That could be tested only by demurrers to the replications, and abiding by the decisions on the demurrers. By pleading over—rejoining—all questions of law upon the replications are waived. Beer v. Philips, Breese, 44, is in point.

Ives is the sole appellee—was the sole plaintiff below. For whose use he sues—what he shall do with the proceeds—pay all to one, or divide them up—does not concern the appellants. The usees are not parties to the suit. They are the several plaintiffs in the writs held by Ives, the constable. Tedrick v. Wells, 152 Ill. 214.

The averment that the suit was for their use was not traversable. Boone v. Stone, 3 Gilm. 537.

Upon the conflicting evidence, the finding of the court is final.

There is no error, and the judgment is affirmed.

George Baker, Jr., v. Thomas Clancy.

1. CONSTRUCTION OF WRITTEN INSTRUMENTS—*Release of Covenants in a Lease*.—A release from all liability or obligation to perform any of the covenants and agreement of a lease includes the obligation to pay rents due and to become due.

Suit for Rent.—Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1896. Reversed and judgment entered in this court. Opinion filed March 8, 1897.

CRAFFTY BROS., JARVIS & CLEVELAND, attorneys for plaintiff in error.

PEASE & McEWEN, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Upon appeal from a justice of the peace the defendant in error recovered the judgment from which this writ of error is prosecuted.

The suit was for rent for the month of April, 1895, claimed to be due and owing under the terms of a certain written demise for two years, of a flat, from the defendant in error to the plaintiff in error, dated May 1, 1894, at \$55 a month.

The only defense was of release under seal. All rent prior to that for the month of April, 1895, was paid.

On April 1, 1895, the plaintiff in error paid the rent for March, and at the same time paid to defendant in error one hundred and sixty dollars more, as a bonus for, or in consideration of the release in question, and thereupon there was indorsed by the defendant in error and delivered to plaintiff in error, on the back of the lease, a release in the following words and figures:

"Know all men by these presents: That I, Thomas Clancy, in consideration of one dollar and other valuable considerations to me paid by George A. Baker, Jr., do hereby release the said George A. Baker, Jr., lessee in the within lease, from all liability or obligation to perform any of the covenants and agreements contained in said lease, said Baker to vacate the 30th day of April, 1895, and in consideration of the above this lease shall become and be fully canceled and terminated on the 30th day of April, 1895.

Witness my hand and seal this first day of April, 1895.

THOMAS CLANCY. [SEAL.]

Nothing was said at the time about the April rent.

The only question in the case is, what is the true construction to be placed upon the release? The trial judge held certain propositions of law, the cause having been submitted to him without a jury, to the effect that Baker was not released from the rent for the month of April, and was liable therefor, and gave judgment accordingly.

The discharging part of the instrument is perfectly plain

Illinois Steel Co. v. Trafas.

and unambiguous; it is that Baker, the lessee, is thereby released “from all liability or obligation to perform any of the covenants and agreements contained in said lease.”

Such a discharge was perfectly consistent with a continuation of the estate or term demised.

The estate conferred by the lease was one that did not at all necessarily depend upon the payment of rents. It could as well be created and continue to exist without payment of rent as with it, if the parties should so agree.

The provisions of the release, that Baker should vacate the premises and that the lease should be canceled, and the estate ended on April 30th, were not in the least degree inconsistent with, nor did they render at all ambiguous the discharge from payment of rent from the date of the writing.

The judgment of the Circuit Court is reversed, and judgment for the plaintiff in error will be entered in this court.

Reversed, and judgment here.

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Illinois Steel Company v. Michael Trafas.

1. NEGLIGENCE—*Injuries from Accident—Employer Not Liable.*—For an injury which occurs to a workman from pure accident, unaccompanied by a want of ordinary care by the employer, such employer is not liable.

TRESPASS ON THE CASE, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

WILLIAMS, HOLT & WHEELER and E. PARMALEE PRENTICE, attorneys for appellant.

KAVANAGH & O'DONNELL, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$7,000, recovered by

the appellee for alleged injuries received by him as an employe of the appellant, working in and about its Bessemer converting works.

The serious burning to which the appellee was subjected, through the alleged negligence of the appellant, was immediately occasioned by the falling of an ingot of hot steel which was being lifted and carried to a car, by means of tongs and a crane, from the place where it had been shaped by a mold from molten metal into a partially solidified form. As the ingot fell it burst, and the yet molten steel of its inside spattered upon and burnt the appellee, causing the injuries complained of.

The ingots are formed by pouring molten steel into molds from a ladle carried by a crane. The cooling process immediately begins, and the part of the steel nearest to the mold, or on the outside, cools the soonest. As soon as may be, the molds are stripped off, leaving the ingot standing upright, about five or six feet high, pyramidal-shaped, and weighing a ton or more. Tongs, constructed somewhat upon the principle of the small tongs used in handling cakes of ice, attached to a chain at the end of a crane are then applied to the ingot, and the surface not yet being entirely hardened, their points sink sufficiently into the metal to hold and carry the ingot as it is lifted by the operation of the crane and swung around to and deposited in pockets on cars that are near by, and are used to carry the ingots into the rolling mill.

A part of appellee's duty, in connection with the operation of one of the cranes that were in the pit, was, by the aid of a long hook, to guide the ingot into position so that when lowered it would be deposited in one of the pockets on the ingot car.

We will not attempt to say where the weight of evidence lay concerning the cause of the fall of the ingot in question. One theory is, that appellee negligently permitted the ingot to strike the side of the car to which it was being directed, and thereby caused the tongs to be loosened so as to let the ingot fall. Another theory is, that the ingot had

Illinois Steel Co. v. Trafas.

not been permitted to sufficiently cool before being lifted, and that in consequence, the ingot collapsed, and so fell. There may be other theories of the cause of the falling of the ingot, but we need not state others, if there be such.

The parties are also in contention as to whether the foreman, or superior officer, under whom the appellee worked, ordered the ingot to be lifted and moved before it had sufficiently cooled so as to be in a safe condition for moving; and also, upon the closer question whether the accident was the result of the negligence of appellee and a fellow-servant who put the tongs upon the ingot, or either of them.

One or more of the counts of the declaration, charged appellant's negligence to consist in a failure to arrange its cranes and appliances in a reasonably safe manner, and to furnish a reasonably safe place for its servants to work in, in that there was insufficient space around said cranes, etc., for said servants to work, and in case of accident, to escape from injury.

The appellee had worked continuously for two years in that particular place and employment, and there was no evidence that the place and implements were not reasonably safe, and such as pertained to like industries elsewhere, and there was no evidence that a safer practicable method or place could have been pursued or furnished.

True, the appellee testified that he tried to escape and could not, after he saw the ingot was about to fall, or was falling, but such testimony manifestly had relation to time rather than to space in which to escape.

The appellant was therefore entitled to have its eighth instruction given in an unmodified form. As offered, it was as follows:

“An employer is not bound to furnish his employes with absolutely safe materials and appliances. He is not an insurer of the safety of his employes or of the perfection of the materials or appliances upon or with which the employe may labor. But his obligation is to use ordinary and reasonable care to supply reasonably safe materials and appliances; and if the jury believe from the evidence that the

defendant furnished Trafas with an ingot reasonably cooled and hardened for moving through the air, held by tongs, and that the ingot fell from pure accident, or from any negligence on the part of Trafas, or because the hold upon the ingot was loosened without negligence of the defendant by reason of striking against, or resting upon, a car, so that the ingot fell over and injured Trafas, then the jury should bring in a verdict of 'not guilty.' "

The court, however, modified the instruction by adding to it as follows :

" Unless they find from the evidence that the defendant was guilty in so arranging and operating the derricks, cranes, cars and appliances in and about the work at the time of the accident so as to unnecessarily and unreasonably endanger the life of the plaintiff while in the performance of his duties."

Appellee has not pointed us, by his brief upon this instruction, to any evidence that justified the words added by the court, and we have not been able to discover any. For an injury which occurs to a workman from pure accident, unaccompanied by a want of ordinary care by the employer, the latter is not responsible. And an instruction which so tells the jury should not have had added to it such qualifying words as bring to their consideration issues which have no support in the evidence; and this is especially true where, as here, the modifying words of the instruction, if proper under any evidence which we have failed to see, omitted all reference to any assumption of risk by the appellee which would have been a necessary subject of consideration in connection with negligence, if any, by the appellant in the arrangement of its machinery and appliances, or the providing of reasonable space to work in.

We might comment upon other features of the case, but we refrain from so doing, believing that if there be any material error therein it will be avoided upon another trial, if one be had.

For the error indicated the judgment will be reversed and the cause remanded.

C. & W. I. R. R. Co. v. Reichert.

Chicago & W. I. R. R. Co. and the Louisville, N. A. & C. Ry. Co. v. Peter Reichert.

1. **ORDINARY CARE—Want of, Precludes a Recovery.**—In actions for personal injuries, if the evidence shows that the plaintiff was not in the exercise of ordinary care for his personal safety at the time of the injury he can not recover.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

On the 25th day of October, 1892, a milk platform about six feet wide, made of plank, was maintained on the east side of the tracks of the Chicago & Western Indiana Railroad, immediately south of the crossing of Archer avenue and extending south, along the tracks about 220 feet to 23d street. This platform was built upon a level with the rails. Between the northern half of the platform and the east rail was a space of about eighteen inches, and between the southern half of the platform and the east rail was a space of two feet, and it is pleaded and claimed that the platform was negligently and dangerously constructed in this particular, in that passing trains did not overlap that half of the platform two feet from the east rail, but did overlap the half of the platform which was only eighteen inches from the east rail for about six inches, and that when this milk platform was covered with cans and many patrons of the railroad were busily engaged in sorting and securing their cans, they would, in the exercise of due care for their own safety, fail to observe for an instant that they were at a point on the platform only eighteen inches from the east rail, where a passing locomotive would overlap the platform about six inches and strike them down.

To the east of the platform there was a roadway about twenty-three feet wide, where milkmen drove their wagons

up to the platform and loaded them with milk cans. To the east of this roadway were two tracks of the Pittsburg, Fort Wayne and Chicago Railroad, running parallel north and south. The tracks of the Chicago and Western Indiana Railroad were four in number and extended in a straight line parallel, north and south.

At about 9:30 o'clock in the morning, on the 25th of October, 1892, appellee, a German milkman, about sixty-eight years of age, went upon this platform, at a distance of about 120 feet south of Archer avenue, for the purpose of receiving certain cans of milk consigned to him, which, with a great many others, had just been unloaded upon this platform and nearly covered the platform, reaching from the northern to the southern portion thereof and nearly across it. Appellee's cans were sitting at about eighteen inches from the west edge of the platform, at a point where the west edge was only eighteen inches from the east rail, and where passing locomotives overlapped the platform about six inches.

Appellee had been going to this milk station for a number of years, and was, presumably, familiar with the platforms, tracks and usual movement of trains thereabouts.

One of the counts of appellee's declaration charged a duty, under all the circumstances, on the part of appellants to have stationed at this milk station some discreet person as a watchman to warn plaintiff, and other patrons, of the approach of engines and cars, and alleges the breach of that duty as one of the proximate causes of the accident.

Appellee commenced to select the cans of milk belonging to him, which were about eighteen inches from the west edge of the platform, and in doing so, went to the west side of his cans and nearest the west edge of the platform in this eighteen inch space, and began to work or roll his cans around out of their position along the west edge of the platform.

While appellee was in this position upon the milk station platform, with his back turned toward the track, a locomotive engine approached backward from the south, at a speed

C. & W. I. R. R. Co. v. Reichert.

of about fifteen miles per hour, without, it is charged, ringing any bell or giving any warning, contrary to the ordinances of the city of Chicago, striking appellee in the side and back, inflicting the injuries for which this suit is brought.

G. W. KRETZINGER and E. C. FIELD, attorneys for appellants.

EDGAR TERHUNE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In the present case it appears that appellee was familiar with the station, the platform and its surroundings.

While, therefore, it is the case that the owners of railroads, which are public highways, are bound to make such landings or places of access to their roads as are necessary for the public accommodation, and to keep them in a reasonably suitable and safe state for the accommodation of the persons who may be expected to use them. 9 Foster (N. H.), 9, 39, 40; Longmore v. R. R. Co., 19 C. B., N. S. 183; 115 Eng. C. L. 183; Sawyer v. R. R. Co., 27 Vt. 377.

Appellee, having full knowledge of the situation of the platform, can not recover because of a defect in the arrangement thereof, if any there was.

Appellee, knowing that this platform projected over the roadway along which locomotives ran, placed himself with his back to the track in a position where he was struck by a passing engine.

Counsel say that it became necessary for appellee to go where he was when hurt. We do not find any evidence justifying such assertion.

Appellee was, with a number of other milkmen, removing cans from the platform. If appellee's cans were on the side nearest the track, the west side of the platform, appellee could have waited until the other cans were removed by their owners, or himself moved them out of the way.

Probably, in thoughtless haste, he went upon the track,

VOL. 69.] Mut. Accident Ass'n of the Northwest v. Simons.

took a can, and, as the evidence shows, backed with it down the line, up which an engine was coming. His danger was seen by his fellow-merchants; they shouted to him—one, close to him, jumped over cans out of the way; appellee was not quick enough and was hit.

The record here presented, shows that appellee was not in the exercise of ordinary care, else, with nothing to obstruct his view, he would have looked down the straight track, and would have seen the approaching engine.

It is urged that there was a failure to ring the bell upon the engine, and that the ordinance so required.

As the accident did not happen at a crossing, the only negligence of the defendant, shown by the evidence, was the failure to ring a bell.

The practice of ringing, or failure by appellant to ring a bell, did not relieve appellee from the obligation to exercise ordinary care. It is not ordinary care to go upon a railroad track and engage in work, standing with one's back to the direction from which trains come and run.

The platform in question was on a level with the railroad track; appellee unnecessarily went thereon, failing to exercise ordinary care for his own safety.

Appellee was not invited to the place at which he was injured. All of his and the other cans were placed where no one need run any risk in taking them therefrom. Appellant was therefore not required to keep a watchman to warn the milkmen of the approach of trains.

The judgment of the Superior Court is reversed and the cause remanded.

Mutual Accident Association of the Northwest v. Robert M. Simons.

Home Protection Aid Association v. Same.

1. **VERDICT—When Opposed to the Evidence.**—When the verdict is clearly opposed to the overwhelming evidence furnished by the plaintiff's own statement, out of court, on the vital questions at issue, the court should not hesitate to set it aside.

Mut. Accident Ass'n of the Northwest v. Simons.

Assumpsit, on a policy of accident insurance. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

M. B. & F. S. LOOMIS, attorneys for appellants.

CLARK VARNUM, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The two appellant associations were, at the time of the issuance of the certificates of membership sued upon, conducted under one management, and were afterward consolidated under the name of The Star Accident Company.

Appellee, a traveling salesman, residing at Lincoln, Nebraska, became a member of each of said associations, and the certificates of membership in question were issued to him at the respective dates thereof, to wit: October 10, 1888 (in the first named association), and July 30, 1890 (in the last named).

These certificates of membership, while unlike in form, were substantially alike in effect and purpose, to wit, the insuring of the member (appellee) against personal bodily injuries effected or received by or through external, violent and accidental means, producing death, or "which shall, independently of all other causes, immediately and wholly disable and prevent him" (the insured) "from the prosecution of any and every kind of business," etc. Each certificate contains a condition to the effect that immediate notice of any accidental injury for which claim may be made under the certificate should be given in writing to the secretary of the association, with full particulars of the accident and injury; and that failure to give such immediate written notice should invalidate all claims under the certificate.

The facts, as disclosed by the record, show that previous to the alleged injury and disability, for which claim is now made, to wit, on or about November 4, 1891, appellee presented a claim against appellants, under these same certificates, for twelve weeks and six days disability on account

VOL. 69.] Mut. Accident Ass'n of the Northwest v. Simons.

of a similar injury claimed to have been received by him on August 6, 1891, in getting off a freight train which started up suddenly, throwing him off and spraining his left foot, and breaking some of its bones. From the disability so suffered by him he recovered, and resumed his usual occupation on November 5, 1891; and he was paid the full amount of his claim, \$642.86, by the appellants.

From that time he continued to follow his occupation for about four months, when, as he claims, he was again injured and suffered the disability for which these suits were brought.

Separate suits against each of the appellants were brought, but by agreement of parties the causes were consolidated and tried together, with the result of a separate verdict and judgment against each of the appellants for the same amount, \$1,433.39.

The manner of receiving the injury is stated by the appellee in each declaration, as follows: "As he was about to step off a street car or cable car, in the city of Omaha, in the State of Nebraska, on said date (March 2, 1892), the said street and cable car suddenly starting (started) up, causing the said plaintiff to be quickly, violently and accidentally thrown therefrom on the ground, causing a severe bruise and injury to the foot of the plaintiff," etc.

The evidence shows plainly enough that the appellee suffered disability from about the alleged date of March 2, 1892, for a period exceeding the number of weeks covered by the insurance policies, and there would not seem to be any question but that the amount recovered by him is proper, if under the evidence he could recover at all.

The appellee went from Omaha to his home, in Lincoln, on March 4th, and on the next day called a physician.

On March 7th the appellee sent a notification to the appellees, as follows:

"LINCOLN, NEBRASKA, March 7, 1892.

T. S. Quincey, Sec'y Star Accident Insurance Company of the Northwest, and Home Protection Aid Association, Chicago.

DEAR SIR: This is to notify you that I was ordered by

Mut. Accident Ass'n of the Northwest v. Simons.

my physician, Dr. R. E. Giffen, of Lincoln, Nebraska, to stop work and lay up from all duties entirely, and to keep off my feet, on account of having sprained the metatarsus bone of my right foot, caused by favoring my left foot that was injured, and walking on it in relation to my duties as a commercial traveler. I have been confined to the house and room since Saturday, March 5th, and can not say when I will be able to resume my duties. Am under Dr. Giffen's care and unable to work, or even walk.

Yours very truly,

ROBERT M. SIMONS."

It will be observed that he there makes no mention of being thrown from the car, but states the injury as having been caused by favoring his left foot, which was the foot that was broken in the accident of August 6, 1891.

Responding to such notification, the appellants sent to appellee their usual printed form, containing a list of questions, which, together with his answers, he returned to the appellants on March 14, 1892.

The form and questions and answers were as follows :

“Office of the
MUTUAL ACCIDENT ASSOCIATION OF THE NORTHWEST
and the
HOME PROTECTION AID ASSOCIATION.

The following questions are simply preliminary. You will please answer them fully and return same to this office, when, according to the circumstances, you will be mailed blanks for final proof, or be notified that the association has no liability for indemnity.

1. Under what circumstances did the accident occur? Give a full description of the time, place, cause, and those who witnessed the circumstances.

(Note: The more complete this report the sooner the association can take action on your case. Facts left out of this report must necessarily be ascertained through other means by the company.)

Injured August 5, '91. Ruptured left foot; went to work November 5, but was lame and had to use brace and anklet

VOL. 69.] Mut. Accident Ass'n of the Northwest v. Simons.

on foot and use a cane; attended by physician ever since, and on March 5th, physician ordered me to lay off on account of the metatarsal bone of my right foot being sprained and my heel being bruised from walking on said foot, caused by my being so lame from injury to left foot, and am not able to attend to my business of commercial traveler.

2. When did you call a physician; who was he; what his address, and what did he do for you ?

Dr. R. E. Giffen, Lincoln, Nebraska. Use proper remedies and keep perfectly quiet and off foot.

3. Are you totally disabled—confined to your house—and if so, how long have you been in this condition; or is your injury of such a nature that you are but “partially” disabled, permitting you to attend to a portion of your business ?

(NOTE: Injuries to the foot, ankle, knee, hip or shin, unless the patient gives the same absolute rest until authorized by the company's representative to use the same, will not be considered. The company does not enforce the “total disability” clause; that is, confinement to the house, for injuries received to other portions of the body. It will be readily seen that a man with a broken arm could, without injury to the same, go to his place of business, while with an injured lower limb he would be contributing to the disability.)

Yes; am totally disabled, and can not walk, as my business of commercial traveler compels me to be able to walk.

Dr. Giffen can give you full particulars, as he has attended me since I was hurt.

4. What are the external and visible signs, and their location ?

Dislocation, swelling and soreness in right foot.

5. Please state what, in the opinion of your physician and yourself, will be the duration of “total” disability ?

Can not say; but will get well as soon as possible; am following physician's directions minutely.

6. What other accident insurance do you carry ?

Iowa State.

Mut. Accident Ass'n of the Northwest v. Simons.

7. Under what occupation is your policy written?

Commercial traveler.

8. Under what occupation were you employed at the time of receiving the injury?

Same.

9. Were you a member in good standing when accident occurred?

Yes.

(Signature. Full name.) ROBERT M. SIMONS.

Address, 1721 C street, Lincoln, Nebraska.

Employed by W. F. McLaughlin & Co. Address, Chicago, Ill. March 14, 1892."

On March 12, 1892, the appellee wrote to the secretary of the Iowa State Traveling Men's Association (which we assume to be the same association that was, in his answer to question No. 6, described as the "Iowa State"), a letter of which the following is a part:

"LINCOLN, NEB., March 12, '92.

FRIEND HALEY: Your letter received and contents noted, and I must say I can not see why I would not be entitled to indemnity, as I never would have had the other lame and sore foot had I not been injured; and it is all caused from that foot and me having to follow my vocation as a commercial traveler. I have no disease in my foot, and all is clearly from an accident, and I can not see how the board of directors can construe it otherwise. Has a man got to be about killed to constitute an accident?

I can clearly prove the cause of my again being laid up as to be from former accident. Please send me proper blank, and when I am well will fill it out. Understand me, friend Haley, I do not want a cent that I am not entitled to—my being laid up is clearly from the result of an accident and nothing else. * * *

R. M. SIMONS."

Again, on April 10, 1892, appellee wrote to the secretary of another accident association at Utica, N. Y., in which he was insured in February, 1892, as follows:

VOL. 69.] Mut. Accident Ass'n of the Northwest v. Simons.

“ LINCOLN, NEB., Apr. 10, 1892.

Edward Treviott, Esq., Secretary, etc., Utica, New York.

DEAR SIR: This is to inform you that on March 5th, I was ordered to lay up, and have been totally disabled ever since and unable to work on account of having sprained my right foot and heel and having a stone bruise in same. How I done it I can not say, but as I will no doubt be confined for some time, thought best to notify you. My physician is Dr. R. E. Giffen, Lincoln, Neb.

Respectfully yours,

ROBERT M. SIMONS.”

And on or about April 25, 1892, appellee sent to the Utica association a preliminary statement, wherin in response to the questions “Where did the accident occur?” “When did the accident occur?” and “How did the accident occur?” he answered to each, “I can not say.”

Along with the statement to the Utica association, he also sent an affidavit by his physician, Doctor Giffen, sworn to on April 25, 1892, wherein the latter says, “that I was called on the 4th day of February, 1892, to see Mr. R. M. Simons, and that I found him suffering from periostitis of the oscalsis, caused by a bruise on the heel,” etc.

All of these statements negative, in one form or another, the claim of appellee, made in his suits, that he suffered a fresh injury on March 2, 1892, by being thrown from a street car.

So far as we are able to discover in the record, no notice to the appellants, or either of them, that the injury from which the appellee suffered, was occasioned by being thrown from a cable car, was given until February 17, 1893, which was only a few days before he began suit.

Under date of February 16, 1893, the appellee furnished to appellants his final proof of claim for indemnity, and therein, for the first time, set forth under oath, “that on March 2, 1892, at Omaha, Nebraska, in getting off a cable street car, the car being started up by conductor before I reached the ground, I came on my right heel too hard, and by so doing bruised it and thereby caused peri-

Mut. Accident Ass'n of the Northwest v. Simons.

ostitis, and it finally resulted in my heel being cut open to let out the pus, and part of the heel bone was also removed, thereby causing me to lose forty-nine weeks and six days loss of time," etc.

The appellee, when testifying at the trial, said:

"I was in Omaha, Nebraska, selling coffee. I landed in Omaha and took the car to go up to the Millard Hotel, and was lame at the time from an injury received prior to that. I was lame in the left foot.

I got up to the corner of 13th and Dodd streets, which is about 150 feet from the Millard Hotel, and signified that I wanted to get off; it is a cable road; the conductor stopped the car and I went to get off, and before I could get off he started the car, and I came down upon my right foot. I was always protecting this left foot and making the right do all the work, as far as I possibly could, because this foot was yet tender; I had hurt it seven months before, but had been working, when I got the second injury, four months between the two, after this one was pronounced well enough so I could go to work. * * * As I struck the ground on this side I partially fell on to one of my grips, and then the car started and kept right on, didn't stop or anything; when I picked myself up I could scarcely walk.

When I stepped off the car I stepped on my right foot and came down with a sharp shock, and I think I struck a cobble stone; the paving in the street was cobble stone and asphalt.

I got a terrible shock with my right foot. All my weight was on my right foot, and I had a grip in each hand, and one cane in this hand with the grip; my coffee grip, which weighed about twenty-five or thirty pounds, was in this right hand; the other one, the lighter grip, was in my left hand; my weight was upon my right side.

The right foot was injured at that time by this shock of striking it against the cobble stone or pavement. It wasn't the left foot that was injured at that time. I was always taking care of that.

I fell only partially down; rested on the grip that I had

VOL. 69.] Mut. Accident Ass'n of the Northwest v. Simons.

in my right hand, my coffee grip. That was the large grip. * * *

The date of this injury was the 2d of March, 1892; it was along about three o'clock in the afternoon. I remained in the hotel until the next morning; I tried to get out and go to work; went to Council Bluffs on the electric line, but found I couldn't work and had to give up. I went to see a few of my best customers as best I could, taking a car and walking lame all day. I staid in Council Bluffs probably three hours, and in Omaha from the afternoon of the 2d until about 8 o'clock on the morning of the 4th.

I went back to Lincoln; I couldn't work and had to go home; I was too lame and in too much agony; too lame in this right heel, the one that I injured in getting off the car the day before. * * *

You see I was a very heavy man at this time. My weight at that time was two hundred and thirty pounds. I weigh now one hundred and ninety-seven, but I wear a six and one-half shoe. I weighed two hundred and thirty pounds at that time; I was overweight. * * *

During the time commencing at the time of my injury on the 2d day of March, 1892, up until the 1st of March, 1893, I was not able to perform my duties as a commercial traveler or salesman, or any part of them; I couldn't walk; I got crutches, and was on crutches for months and months and months."

There was no corroboration of appellee's account of the manner in which he claimed to have been hurt on March 2, 1891. He was seen about that time, and probably on that very day, showing indications of suffering pain, but no one saw him when he says he fell, and no one except himself says how he got hurt.

We have no wish to prejudice the appellee in another trial by commenting with harshness upon the character of the case as shown by this record, but in view of his repeated contemporaneous, deliberate and uniform statements in writing (which we have quoted), made shortly after he became disabled in March, 1892, and never varied from in any

Mut. Accident Ass'n of the Northwest v. Simons.

communication to the appellants, until just before he began this suit in February, 1893, it is our plain duty to reverse the judgments he recovered.

The overwhelming weight of the evidence is opposed to his present theory of becoming freshly injured in March, 1892.

It is incredible that appellee could have made the written statements he did so near the time of the alleged accident in March, 1892, without mentioning such circumstance, if it occurred. It is altogether more probable that the painful injury suffered by him was, as he answered to question 1, in the form furnished him by the appellants, "on account of the metatarsal bone of my right foot being sprained and my heel being bruised from walking on said foot, caused by my being so lame from injury to left foot," or, as he otherwise said, in one or more of his written statements, "caused by favoring my left foot that was injured" in the preceding August, and for which he had probably settled too early.

Nor will it answer to do away with the effect of those numerous statements, as he attempts to upon his cross-examination, in the following manner:

"Q. Then when you stated to these defendant companies and to the Utica company, as well, that you had no knowledge of when you received any injury, and that you presumed it occurred from overusing your right foot, you say that was a mistake? A. Yes, sir; that statement was.

Q. You go back on that whole thing? A. I go back on it; yes, sir."

It is not contended by appellee that if he were not injured by the fall from the cable car as alleged in his declarations, he is entitled to sustain the judgments obtained by him.

While verdicts of juries as to facts must ordinarily be sustained, there is no rule that requires them to be upheld when they are manifestly contrary to the great preponderance of the evidence. But, on the other hand, it is our plain duty to reverse judgments that are entered upon ver-

VOL. 69.] Calumet Electric Street Ry. Co. v. Nolan.

dicts so opposed to the evidence. C. & E. R. R. Co. v. Meech, 163 Ill. 305; C. & N. W. Ry. Co. v. Holdom, 66 Ill. App. 201.

The verdict in this case was so clearly opposed to the overwhelming evidence, furnished by the appellee's own statements, on the vital question at issue, that no court should hesitate to set it aside.

The judgment is reversed and the cause remanded.

Calumet Electric St. Ry. Co. v. Henry C. Nolan.

1. **NEGLIGENCE—*Of the Plaintiff Precludes a Recovery.***—When it is apparent from the evidence that the plaintiff, in an action for personal injuries, was himself guilty of negligence, he can not recover.

2. **COMPARATIVE NEGLIGENCE—*The Doctrine Repudiated.***—The doctrine of comparative negligence has been formally repudiated in Lake Shore & M. S. Ry. Co. v. Hessions, 150 Ill. 546.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

JUDSON F. GOING and J. A. BURHANS, attorneys for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment in the Superior Court against the appellant for injuries received by him through the alleged negligence of the appellant.

He was driving a double team, drawing a wagon with a load of wood. His seat was in front of the box, by the horses, about seven feet from the ground.

A car was coming behind, and he undertook to turn out. The negligence of the appellant is alleged to be, that holes

Calumet Electric Street Ry. Co. v. Nolan.

were worn in the wood between the rails of the track, into one of which holes a fore wheel of the wagon dropped, throwing the appellee to the ground.

No one but the appellee had any knowledge that the wheel dropped into a hole, and as he was knocked senseless, and remained so until his team was a block and a half away, his testimony that the wheel so dropped is no proof.

He sat forward of the wheels. Where the wheels were when he fell was not within his view. If he infers that the wheel dropped into a hole from seeing the hole before he was over it, then his negligence in driving into it is a bar to recovery; and if he did not so see, he has no proof that the wheel of his wagon dropped into any hole.

The inference that his wheel dropped into some one of the many holes there, does not make a case, because such holes being visible, he should have avoided them. Kornetski v. City of Detroit, 94 Mich. 341; City of Chicago v. Morse, 33 Ill. App. 61.

The wood in which holes were worn does not appear to have been part of the track, but rather of the street.

The ordinance under which the road was constructed provided that "the tracks of said railway shall not be elevated above the surface of the street, and shall be laid with modern improved rails, and in such a manner that carriages and other vehicles can easily and freely cross the same at all points and in all directions without obstruction."

There is no evidence that this ordinance had not been complied with; and no obligation on the part of the appellant to keep any part of the street in repair is shown.

In any possible view of the evidence the appellee had no case.

The old doctrine of comparative negligence formulated by Judge Breese in Galena and Chicago Union R. R. v. Jacobs, 20 Ill. 478, and running its course through scores of volumes of the Illinois Reports, after being often nibbled at, has been finally formally repudiated in Lake Shore & Michigan Southern Ry. v. Hessions, 150 Ill. 546.

The judgment is reversed and the cause remanded.

A. L. Deane et al. v. Michigan Stove Company.

1. **PRESUMPTIONS—Where the Declaration is not Abstracted.**—Where the declaration is not shown by the abstract, if the evidence sustains any cause of action, the court will presume that the declaration has well stated it, and the judgment must stand, but if upon no theory of law a recovery could be sustained under the evidence, then the judgment must be reversed.

2. **DAMAGES—Sale of a Burglar Proof Safe.**—Appellants sold to appellee a safe for \$175, warranting to be burglar proof, if certain directions furnished for locking it were followed; the directions were incomplete, and although followed, burglars, without the use of force, opened it and stole \$141.05. In an action upon the warranty the appellee recovered the amount stolen. *Held*, the recovery was proper.

Assumpsit, upon a warranty. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

MILTON I. BECK, attorney for appellants.

CRATTY Bros., JARVIS & CLEVELAND, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellants were dealers in safes, and sold to the appellee a second-hand burglar-proof safe. At the time of making the sale the appellants delivered to appellee what purported to be, and what they represented as being, correct written instructions for locking and unlocking the safe, which, however, were in fact incomplete in the omission of an instruction or direction which was essential to securely lock the safe against any experienced safe opener, although without it the safe would be apparently securely locked.

Appellee placed the safe in its fire-proof vault and used it for about two years, and always locked and unlocked it according to the directions so furnished.

Deane v. Michigan Stove Co.

Finally, however, burglars at night time forced open the vault door by violence, and without any apparent use of force upon the safe itself, unlocked it and stole \$441.05 in money from it.

The appellee sued and recovered judgment for the amount of money so stolen.

The price paid for the safe was \$175.

The appellee was a dealer in stoves, and had a place of business in Chicago. Just before the negotiations for the safe in question were begun, a fire-proof safe which appellee had been using in its business was burglarized, and that fact was stated to appellants, or their salesman, by an agent of appellee when he went to appellants' store and applied for a burglar-proof safe, and he was further told that the object appellee had in getting another safe was to avoid a repetition of being burglarized.

Previous to that interview, but after the first burglary, the cashier of the appellants, who sometimes also acted as their salesman, went to appellee's place of business and upon examination found that the safe which had been the subject of the first burglary was only fire-proof, and he recommended the purchase by appellee of a burglar-proof safe.

It would seem, therefore, that there was contemplated by the parties a purchase by one and a sale by the other of what is known as a burglar-proof safe, which, when properly locked, would be reasonably safe against ordinary attacks by a burglar. We can not give to their contract a meaning that the safe should be burglar-proof against all attacks by burglars, for there was undisputed evidence that no such safe was or could be made, but only the meaning that it should be burglar-proof in the commercial sense, as distinguishing it from the commercially known fire-proof safe.

To constitute such a safe it was proved that a combination lock was an essential part, and that to be effectual and practicable, the combination must be properly set, and, of course, must be known to the user of the safe.

It is undisputed that the written directions for locking and unlocking the safe were incomplete. The locking of

VOL. 69.]Deane v. Michigan Stove Co.

the safe according to those directions left the safe only apparently secure, while to an experienced safe opener no more than ten seconds would be required to open the door, as was demonstrated by appellants' representative, who, after locking the safe according to such directions, opened it in that space of time the morning after the burglary.

The declaration is not abstracted, as required by the rules of this court. It is only mentioned in one place as "narr," and in another as "amendment to narr," with the dates of filing, and although the point is specifically insisted upon in appellee's brief, no attempt has been made by appellant to file a better abstract.

If, therefore, as we have frequently held, the evidence sustains any cause of action, we will presume the declaration has well stated it, and the judgment must stand, but if upon no theory of law a recovery could be sustained under the evidence, then the judgment must be reversed. See, also, City of Chicago v. Moore, 139 Ill. 201; McCormick, etc., v. Burandt, 37 Ill. App. 165; and same case in 136 Ill. 170.

The case was tried by the court without a jury, and the evidence appears to be sufficient to sustain the finding that there was a warranty by the appellants that the safe was burglar-proof, within the commercial and ordinary sense of that term, and that the directions for locking the safe would, if followed, render the safe reasonably secure, when so locked, against an ordinary attempt by a burglar to open it.

There was clearly a breach of the warranty in the latter respect, although not in the former. So far as the safe itself was concerned, considered separately from the directions to lock it, there is nothing to show that it was not what it was represented to be. It was in no manner broken or impaired, nor was the lock itself. Both safe and lock were as perfect after as before the burglary, and as well prepared as ever to perform the duty for which it was purchased.

The whole fault of appellants was in furnishing incomplete directions how to manipulate the lock. Because of

Deane v. Michigan Stove Co.

their failure therein, the safe was easily burglarized, and appellee's loss of money ensued.

No question is made but that the safe was locked according to the directions that were furnished by appellants, and it was proved that with a lock of that kind properly set, the door of the safe would be substantially as impervious to attack by one who did not know the combination, as any other part of the safe.

No point is made by appellants that the amount of money which was left in the safe by appellee and taken from it by the burglars was an unreasonable risk to subject the safe to; nor is it claimed by the appellee that the appellants were guilty of any willful deceit or fraud in the transaction.

Questions of much nicety arise upon such a state of facts, and we have been cited to no case in point, nor have we been able, after considerable diligence, to find one.

The general rule enunciated in many cases, and pretty well understood, is that for a breach of warranty the damages, if anything more than nominal, are such only as follow as a natural and proximate consequence from the breach.

Here, however, we have the unusual intervention of a third person—the burglar—from whose acts the loss immediately came. Of course, the burglar would be liable for the tort committed by him, but are not the sellers of the safe liable upon their breach of contract, because thereby the tort committed by the burglar was induced and rendered easy of accomplishment?

It seems to us to be no undue stretch of the other well established rule, that if the damages suffered be such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it, to hold that under the evidence in this case, the very intervention of a burglar was the essential element that both parties contemplated as being the thing to be guarded against, and concerning which the warranty was interposed.

If so, then the consequence that followed was the natural

VOL. 69.] South Chicago City Ry. Co. v. Adamson.

and proximate result of the breach, and the recovery was right.

Authorities consulted by us may be found in Sedgwick on Damages, Benjamin on Sales, Sutherland on Damages, 5 Am. & Eng. Ency. of Law, title, "Damages," Wait's Actions and Defenses, and Herring v. Skaggs, 62 Ala. 180.

The judgment is affirmed.

MR. JUSTICE GARY.

It is easy to imagine cases where the loss might be so disproportionate to the price of the safe that it would seem difficult, if not impossible, to treat it as the measure of damages. The case of a passenger carrier sued in assumpsit for the loss of luggage seems most analogous.

In such a case the passenger may recover a reasonable amount for money carried in his trunk. Ill. Cent. R. R. v. Copeland, 24 Ill. 332; Hutchinson on Carriers, Chap. 13.

South Chicago City Railway Company v. Ivert Adamson.

1. CONTRIBUTORY NEGLIGENCE—*Forbids a Recovery.*—The law of contributory negligence forbids a recovery by one who, by his own fault, brings an injury upon himself, and it is no longer a question of comparison as to who was most at fault.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

OSBORN & LYNDE, attorneys for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In a suit for personal injuries received by the appellee, he recovered a verdict against the appellant for \$3,800,

South Chicago City Ry. Co. v. Adamson.

which was remitted down to \$2,000, and judgment for that amount was entered upon the verdict.

The circumstances of the accident out of which the suit arose were, briefly, that the appellee was driving his team and empty wagon north on Stony Island avenue between 76th and 75th streets, on which avenue the appellant operated a double track line of electric cars. The appellee was driving on the east side of the avenue, and about the time he reached 75th street he turned his team and attempted to cross the car tracks, but before he got over, the rear part of his wagon was struck by an electric car going north, and he was thrown out and sustained the injuries complained of.

We do not need to mention why it was necessary for appellee to cross the track. His right to do so, with ordinary care, was equal to that of the appellant to use the track.

The track was a foot or more higher than the roadway on either side of it, and in order to make the crossing, it was manifestly good driving to go slowly, and it was the part of good judgment by a driver to make the crossing at nearly a right angle to the track, so as to avoid the sliding or sluing of the wagon wheels when they should strike the iron rails of the track.

And the appellee seems to have both driven slowly, and at nearly a right angle to the track.

But whether, under circumstances rendering such a course wise and prudent, he should have attempted to cross in front of an electric car which was approaching him at so short a distance away as in this case, and which he saw before he started to make the crossing, raised the very important and close question whether he was not guilty of contributory negligence to such a degree as to bar him from any recovery.

Without reciting the evidence, it is enough to say that the question of his contributory negligence in bringing the accident upon himself, was the controlling question of fact in the case. We need not, at this time, say that the weight of the evidence upon that subject was so clearly opposed to the verdict as to justify our reversal of the judgment on that

VOL. 69.] South Chicago City Ry. Co. v. Adamson.

ground, although it is made our duty under the law to consider the evidence, and to set aside verdicts that are not supported by it. C. & E. R. R. Co. v. Meech, 163 Ill. 305; C. & N. W. Ry. Co. v. Holdom, 66 Ill. App. 201.

But there was, at least, so much evidence tending to show contributory negligence by the appellee, as to require a critical examination of the instructions that were given covering that question.

The seventh instruction asked by the appellant was as follows:

"7. If the jury shall find from the evidence that both the motorman and the plaintiff supposed that the plaintiff would be able to get across the track without being struck by the car, and that in so doing they both erred in their judgment in respect to the matter, and that the accident was due to such error in judgment on their part, then the plaintiff can not recover, and their verdict must be for the defendant."

Instead of giving it as asked, the court modified it by inserting after the words "in respect to the matter" the words "and both exercised ordinary care and caution up to the time of the collision."

The theory upon which the instruction was drawn was, that both the motorman and the appellee were chargeable with the exercise of care and judgment in the situation in which they were placed, and that if in such regard they both erred, and the accident resulted in consequence of such joint error, no recovery could be had. If both were equally negligent, there could be no recovery, is well settled law.

The instruction was warranted under the evidence that tended to show that the appellee erred in judgment in supposing that he had time to cross the track, and that the motorman likewise erred in judgment in not beginning sooner than he did to try to stop his train, and should have been given as requested. The modification of the instruction, by adding the words quoted, was equivalent to telling the jury that appellee could recover unless both himself and the motorman were in the exercise of ordinary care. In

Holmstrom v. Oldham Bank.

other words, if the motorman was exercising ordinary care, and the appellee was not, then appellee could recover, which is much the same as saying that the degree of care on the part of appellee was immaterial, however careful the motorman may have been.

Such is not the law. The law of contributory negligence forbids a recovery by one who, by his own fault, brings an injury upon himself, and "it is no longer a question of comparison as to who was most at fault.

The appellant had a right to have the instruction squarely present to the jury, the law that if the accident were due to the joint negligence of the motorman and the appellee, no recovery could be had, disconnected with the other and inconsistent elements embodied in the modifying words inserted by the court.

For the fault in modifying the instruction, and upon the question of whether the appellee was guilty of a degree of negligence which should bar his recovery, we think there should be another trial.

The judgment of the Circuit Court is reversed and the cause remanded.

Charles Holmstrom v. Oldham Bank.

1. INSTRUCTIONS—*To Find for the Plaintiff.*—Under the evidence in this case the court finds that the instruction to find for the plaintiff was proper.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

B. M. SHAFFNER, attorney for appellant.

JOHN T. RICHARDS, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Appellee, the first indorsee of a promissory note for \$362.50, made by the appellant to Fible & Crabb Distilling Company, brought suit on the note and recovered the judgment for \$402.22, which is appealed from. Pleas of failure of consideration, and that appellee took the note after maturity, without consideration, and was a mere volunteer holder thereof, were interposed, to which appropriate replications were filed.

The evidence showed conclusively, that appellee acquired the note by discounting it long before its maturity for its face value, less the discount, in the regular course of business, and without notice of the equities, if any, which may have existed between the maker and the payee.

At the conclusion of the evidence, the court instructed the jury to find the issues for the plaintiff, and to assess the damages at the sum for which judgment was entered. Under the evidence, the instruction was proper; and there was no error in rejecting the evidence offered by the appellant, nor in refusing the instructions asked by him, nor in refusing to permit appellant's attorney to address the jury in argument after the instruction was given. The case is an exceedingly simple one and the judgment was right. Affirmed.

| 69 114
177. 386

Virginia B. Holmes v. George J. Williams.

1. GUARANTY—*Blank Indorsements*.—A blank indorsement upon a promissory note is, *prima facie*, a guaranty, and authorizes the holder of such note to write a contract of guaranty over such indorsement.

2. SAME—*Made After the Delivery of the Note—Consideration*.—Where it is alleged that a guaranty was made after the delivery of the note, to the payee it is necessary to allege and prove a consideration for such guaranty.

Assumpsit, on a guaranty of a promissory note. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge,

Holmes v. Williams.

presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

Wm. J. TEWKESBURY and McCLELLAN & LITTLE, attorneys for appellant.

SLUSSER & JOHNSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued, and recovered judgment against, the appellant for \$744.84, as the unpaid balance of a promissory note as follows:

“CHICAGO, ILL., January 21, 1891.

Twenty-four months after date, for value received, I promise to pay to the order of Ira Holmes, sixteen hundred (1,600) dollars, at his office, with interest at six per cent per annum, after date, until paid.

(Then follows a warrant of attorney to confess judgment.) This note is secured by a chattel mortgage of even date.

ELIZABETH WALLACE.

(Indorsed on the back.)

For value received, I hereby guarantee the payment of the within note at its maturity.

VIRGINIA B. HOLMES.

Pay to the order of George J. Williams.

IRA HOLMES.”

The guaranty over the appellant's name was written when this suit was begun. Her blank indorsement is, *prima facie*, a guaranty. Kingsland v. Koeppe, 35 Ill. App. 81; S. C., 137 Ill. 544.

The holder of the paper was authorized to write the guaranty over the signature. Swigart v. Weare, 37 Ill. App. 258.

As the declaration alleged that the guaranty was made after the delivery of the note to the payee, it was necessary to allege and prove a consideration for the guaranty. Featherstone v. Hendrick, 59 Ill. App. 497; White v. Weaver, 41 Ill. 409; Joslyn v. Collinson, 26 Ill. 61.

The declaration alleged that consideration to be that the appellee "would accept and receive the said note of the said Ira Holmes, and for a valuable consideration to her in hand paid by the" appellee. Now while the first part of that alleged consideration may be said to be no consideration at all, being neither detriment to the appellee nor benefit to the appellant, and while there was no attempt to prove the other part, yet as no objection on account of variance was made at the trial, if on the whole case a sufficient consideration appear, such variance, being removable by amendment, may be disregarded. McCormick Machine Co. v. Burandt, 136 Ill. 170; City of Chicago v. Moore, 139 Ill. 201.

There was evidence that the appellee advanced money to Ira Holmes on many notes upon which the plaintiff had placed her name; that she was asked both by the appellee and his attorney, whether she understood the obligations she was incurring, and that, among other things, she replied that she did understand them, and showed that she did by the tenor of the conversation; that the appellee told her that he was liable to have considerable of her paper—paper with her name on—and she said she was guaranteeing the notes, and assisting Ira (her husband), who had a fair prospect of getting out of debt, and making some money.

The fair conclusion on the whole case is, that she intrusted her husband with her name as guarantor upon paper, to be used by him in his discretion. Under such circumstances, the consideration to him was—by implication—at her request, although the note in suit was not the particular subject of any communication between her and the appellee, or any one representing him. Whether the implication mentioned be a fair one, is fairly debatable, but on the whole we deem it right.

The finding for the appellee is, so far as relates to consideration, justified by the evidence.

The other defense alleged is, that by an agreement between the maker of the note—Wallace—and Ira Holmes,

Friedman v. Schwabacher.

with the assent of the appellee, Wallace was discharged, and that the effect of discharging Wallace was to discharge the appellee. The answer to that defense is, that there is, first: Conflicting testimony upon the subject; and, second, that the business relations between the appellant and her husband were on such a footing as fairly to imply her consent to his endeavors to get out of debt, among which were the negotiations with Wallace—whatever may have been their character. It appears, on the version of the appellant, that as a result of those negotiations, Ira delivered to the appellee a note and chattel mortgage which, if paid, would have extinguished the cause of action in this suit; but it is not shown that such payment was made, or that the appellee is in fault on that note and chattel mortgage. It is not claimed that if the appellee was entitled to recover, the amount recovered is wrong.

The judgment is affirmed.

MR. PRESIDING JUSTICE SHEPARD.

I can not quite concur, but hoping that the Supreme Court may have an opportunity to pass upon the questions, which are of much collateral importance, I waive any discussion by way of dissent.

S. Friedman v. H. Schwabacher and J. Schwabacher

1. **FRAUD—*In the Consideration of Sealed Instruments.***—At law, fraud in the consideration of a sealed instrument is no defense.

Action for Rent.—Appeal from the Circuit Court of Cook county; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

BLUM & BLUM, attorneys for appellant.

ASHCRAFT, GORDON & COX, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

All of the questions but one, presented by this case, are settled adversely to the appellant in the case of the same title as this. 64 Ill. App. 422.

That question, not there settled, is whether a fraud perpetrated by the agent of the appellees, in misrepresenting the sanitary condition of the demised premises before the lease—under seal—was made, can be shown by the appellant in avoidance of the lease, and upon that the law is that, at law, fraud in the consideration of a deed is no defense. Todd v. Mitchell, 67 Ill. App. 84; Windett v. Hurlbut, 115 Ill. 403, and Johnson v. Wilson, 33 Ill. App. 639.

This last case was upon a lease under seal.

All sealed instruments are deeds, whether they be conveyances or executory contracts. Bouvier Law Dict., "Deed."

If the statute concerning negotiable instruments has taken them out of this rule, this case is not affected thereby, as a lease is not embraced by that statute. Canadian Bank v. McCrea, 106 Ill. 281.

The judgment is affirmed.

West Chicago St. R. R. Co. v. P. C. Feeney.

1. **VERDICTS—Conclusive.**—A verdict that the defendant was guilty of negligence and that the plaintiff was not, is, ordinarily, the end of the contest.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

JOHN F. WATERS, attorney for appellee.

Jamieson v. Holm.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a passenger, sitting on a seat on the left hand, or south side, of a grip car going west, and the only way to get off, other than stepping to the ground on that side, was to walk along a foot-board on the side of the car to the rear end, cross over and step off there. The distance from the track on which the car was, to the track on which cars ran east, was four feet ten and one-half inches.

How much the cars overhung outside the track does not appear, but it is common knowledge that the foot-board of a car is considerably outside the rail of the track.

The car stopped for passengers to alight, and the appellee stepped off on the south side. Another car going east on the south track came along, and, between the two, the appellee was knocked down, and sustained the injuries for which he sued.

Upon these facts, the jury found that the appellant was negligent, and that the appellee was not, which ends that contest. The damages, after a remittitur, are not such as to be complained of, and it is only of damages and the verdict for the appellee, that the appellant does complain. The judgment is affirmed.

69 119
173. 295

Egbert Jamieson v. John Holm.

1. **DECREE—When a Bar at Law.**—A decree of a court of equity is a bar at law to any other proceeding between the same parties in the same cause of action.

2. **GUARANTOR—Discharge When the Principal Debt is Extinguished.**—The difference between sureties who directly and absolutely undertake to pay, assignors or indorsers of negotiable instruments who contingently undertake to pay, and guarantors who undertake that the principal shall pay, is merely formal, their rights, so far as dependent upon the relations of the creditor and the principal, are the same. If by any means the principal is discharged, generally the debt is extinguished and the guaranty that he will pay it ended.

VOL. 69.]Jamieson v. Holm.

Assumpsit, upon a guaranty. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1893. Reversed and judgment entered in this court. WATERMAN, J., dissents. Opinion filed March 8, 1897.

EGBERT JAMIESON, *pro se.*

JAMES FRAKE and B. W. ELLIS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This suit is by the appellee upon a guaranty by the appellant of a promissory note made by the Great Western Wire Works, payable to its own order, and which, by indorsement, came to the hands of the appellee.

The defense is that in a chancery suit wherein creditors of the Wire Works were complainants, and the Wire Works and the appellee were among the defendants, the decree declared the note to be fraudulent and void, canceled and surrendered, and a judgment which had been entered thereon by confession in favor of the appellee to be annulled, vacated and for naught held, and the appellee perpetually enjoined from assigning the judgment or taking any step toward collecting it.

A decree of a court of equity is a bar at law to any other proceeding between the same parties on the same cause of action. Stickney v. Goudy, 132 Ill. 213.

And that it is by default does not affect the rule. Hazen v. Reed, 30 Mich. 331; Barton v. Anderson, 104 Ind. 578; Black on Judgments, Sec. 81, 697.

But the appellant, not being a party to that suit, can not claim any direct benefit from it; if it be available to him, it is upon the ground that the decree extinguished the claim of the appellee upon the Wire Works, from which the appellant—if he pay the note—is entitled to reimbursement; and therefore, as the appellee can not directly proceed against the Wire Works, he may not by indirection charge the Wire Works.

This principle is one ground of decision in Dickason v. Bell, 13 La. Ann. 249.

The answer made to that case—among others cited by

Jamieson v. Holm.

the appellant—is, that the case was of a surety, and not of a guarantor.

The difference between sureties who directly and absolutely undertake to pay, assignors or indorsers of negotiable instruments who contingently undertake to pay, and guarantors who undertake that the principal shall pay, is merely formal.

Their rights—so far as dependent upon the relations of the creditor and the principal—are the same. If by any means the principal is discharged, generally the debt is extinguished, and the guaranty that he will pay it ended. Brandt Sur. & Guar., Ch. 4.

Now that decrees may be made between defendants, binding upon them reciprocally, based only upon pleadings between complainants and defendants, is a doctrine declared and enforced in a multitude of cases.

In Waldo v. Waldo, 52 Mich. 91, the case was that a brother and sister claimed as sole heirs of their father. The sister first filed a bill to establish their title, making her brother and the widow defendants, and was defeated. Then the brother filed a like bill, and it was held that the first was a bar.

In Farquharson v. Seton, 5 Russ. 45, a junior incumbrancer filed a bill against the debtor and a prior incumbrancer, alleging that the prior incumbrance was in part fictitious, but the decree established its validity. It was held that the decree was a bar to a subsequent bill by the debtor attacking the amount of the prior incumbrance.

Whether the decree relied upon by the appellant ought to have been made is not a question here; the court had jurisdiction of the subject-matter and persons; and error in it—if error there be—can not be a ground for collateral attack.

The case was decided upon demurrer to a plea setting out at length the defense, and by their briefs the parties agree that they stipulated that whichever way the demurrer should be decided, the judgment should be final.

The judgment should have been for the appellant, and will be so entered here. Judgment entered for appellant here.

MR. JUSTICE WATERMAN dissents.

William J. Brownell v. Brattleboro Savings Bank.**Same v. Elizabeth R. Boughter.****Same v. John Gray.**

1. APPEAL—From Orders in Subsequent Proceedings—Effect on Original Decree.—An appeal from a decree can be taken only at the term at which the decree is entered. If subsequent proceedings are founded upon such decree and an appeal prosecuted from an order or decree entered in such subsequent proceedings, any attack in such appeal upon the original decree is but collateral, and mere error is immaterial.

Bill for Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

WILLIAM E. HUGHES, attorney for appellant.

STILLMAN & MARTYN, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
These are appeals from deficiency decrees after distributing the proceeds of the sales under foreclosure decrees. The first dozen assigned errors are to the foreclosure decrees, which are not before us for review on these appeals. An appeal from a decree can be taken only at the term at which the decree is entered. If subsequent proceedings are founded upon it, and an appeal prosecuted from an order or decree entered in such subsequent proceedings, any attack then upon the original decree is but collateral, and mere error is immaterial. Freeman v. Freeman, 66 Ill. 53; Haas v. Chicago Building Soc., 89 Ill. 498; Campbell v. Jacobson, 44 Ill. App. 238.

The errors alleged as to the deficiency decrees are supported neither by the record nor by argument.

The three cases are, as to questions involved, exactly alike, and the decrees are affirmed.

Chicago Forge and Bolt Co. v. Rose.

ao 123
70 - 69

Chicago Forge and Bolt Co., and Walter L. Lee v. Louis Rose.

1. MALICIOUS PROSECUTION—*Probable Cause*.—A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offense, is sufficient to show probable cause.

2. SAME—*Advice of Counsel*.—If a party communicate to counsel all the facts bearing upon the guilt of the accused, of which he has knowledge or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel, he can not be held responsible in an action for malicious prosecution for his conduct.

3. SAME—*Advice of Counsel a Question of Fact*.—It is a question of fact, in an action for malicious prosecution, whether a party has fairly communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, and whether he acted in good faith upon the advice received from counsel.

4. JUDGMENTS—*Effect of a Reversal*.—The reversal of a judgment by the Appellate Court destroys its effect as an estoppel; the judgment no longer effects a merger of the cause of action, and it does not bar a second action on the same demand.

Malicious Prosecutions.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Reversed with a finding of facts. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

This was a suit for malicious prosecution, brought by appellee against the Chicago Forge and Bolt Company and Walter L. Lee, its manager, appellants. On October 27, 1892, appellant Lee, on behalf of his company, made complaint before Justice Blume, charging that appellee had unlawfully and willfully concealed a certain crime committed by one A. Burnstein, Herman Peter Burnstein, Louis Burnstein and Frank H. Smiley, to wit, the crime of conspiring to obtain \$10,000 of the Chicago Forge and Bolt Company by false pretenses, and that said Rose had harbored, assisted and maintained each of said conspirators, and had in fact declared that he would not give up or reveal the facts of said crime for \$1,000. On this complaint a warrant issued, and appellee was arrested. This proceeding was dismissed

VOL. 69.] Chicago Forge and Bolt Co. v. Rose.

for want of prosecution. It appears that afterward, in the Criminal Court, the three Burnsteins were found guilty; as to appellee a *nol pros.* was entered. After this he brought this action, wherein the jury returned for him a verdict for \$7,000, from which there was remitted \$6,300, and judgment was entered for \$700.

MAHER & GILBERT, attorneys for appellants.

B. M. SHAFFNER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

To the maintenance of an action for malicious prosecution, proof of two things is essential, viz.: A want of probable cause for the prosecution complained of, and that it was malicious. Proof of a want of probable cause having been made, malice may, but need not be, inferred by the jury; but from proof of malice the jury can not infer that there was a lack of probable cause. Smith v. Michigan Buggy Co., 66 Ill. App. 516; Epstein v. Berkowsky, 64 Ill. App. 498.

In the present case, the issue was not whether appellee was guilty of the offense for which he had been prosecuted.

A question presented was whether appellants had probable cause for believing him so guilty at the time they instigated the prosecution against him. Upon this there was much uncontradicted evidence that they had probable cause; while the clear preponderance, also, of the testimony, concerning which there was a conflict, is in harmony with the undenied evidence. A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offense, is sufficient to show probable cause. Jacks v. Stimpson, 13 Ill. 702.

There was a failure to establish want of probable cause, and the jury should, for this reason, have been instructed to find for the defendant. Harpham v. Whitney, 77 Ill. 32-39-42; 14 Am. & Eng. Ency. of Law, 45.

Chicago Forge and Bolt Co. v. Rose.

If a party communicate to counsel all the facts bearing upon the guilt of the accused of which he has knowledge, or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel, he can not, in this form of action, be held responsible for such conduct. It is a question of fact in such case, whether the party has fairly communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth; and also whether he acted in good faith upon the advice received from counsel. *Anderson v. Friend*, 71 Ill. 475; 14 Am. & Eng. Ency. of Law, 53.

In the present case it appeared that appellants did consult reputable counsel, and did communicate to him all the facts they had learned and all which there is any reason for thinking they, by reasonable diligence, could have learned; that such counsel advised the prosecution, and appellants, in good faith, afterward acted upon such advice.

It also appeared that appellants' counsel saw the state's attorney and told him all that he knew and had been informed, and was by the state's attorney advised to proceed against appellee and the Burnsteins before a justice of the peace, as was afterward done.

There was no evidence tending to show that appellants did not act in good faith in prosecuting appellee.

We are of the opinion that the judgment of the Superior Court should be reversed without a remanding order; a finding of facts being here made. As to the effect of a reversal without remanding, in Bacon's Abridgment, Error, M. 2, the rule is thus declared:

"If judgment be given against the defendant, and he bring a writ of error upon which the judgment is reversed, the judgment shall only be *quod judicium reversetur*, for the writ of error is brought only to be eased and discharged from that judgment."

It was formerly a question whether upon the reversal of a judgment for the plaintiff, the court could grant a *venire facias de novo*.

Lord Mansfield, in *Harwood v. Goodright*, 1st Cowper,

87, suggested a doubt as to this, but in the same case expressed the opinion that if such writ had been asked for the court could have granted the same.

In Sterrett v. Bull, 1 Binn. 234, the case of Street v. Hopkinson, 2 Strange's Reports, 1055, was referred to, in which it was held that in such case the court could not award a *venire de novo*; but the court in Sterrett v. Bull did award a *venire de novo*, basing its action largely upon the practice adopted by the Supreme Court of the United States.

And it is said in Fries v. Pa. R. R. Co., 98 Pa. St. 142, that the power of the court to award a new trial in the case of a reversal of the judgment of the court below, is well settled and that a judgment of reversal without a venire is not such a final judgment that an execution can issue thereon for the collection of costs.

And in Mercer v. Watson, 1 Watts, 330, the court say: "A judgment merely reversing the judgment of the court below, rendered on a general verdict, may be, and often is, for a cause that does not ultimately vary or change the final determination of the case. It may furnish some ground to presume that the party against whom the writ of error was sued out, or the court, or both, if you please, thought that from the nature of the case that had been declared, a *venire facias de novo* would not be likely to be available to the defendant in error; but not to prevent absolutely his bringing a new action in case he should afterward change his mind, or discover that he can supply what was wanting before, or in any way overcome the difficulty or objection then interposed to his recovery."

In 2 Phillips on Evidence, Cowan & Hill's notes, marginal paging 18, it is said: "So the reversal of a judgment proves nothing but its own correctness. It operates no further than to nullify what has been done, but in other respects the parties are generally left in the same situation as to their rights and remedies touching the matter in controversy as if no such judgment had ever existed."

The rule, as announced in Black on Judgments, Sec. 683, is: "The reversal of a judgment throws the whole matter

Chicago Forge and Bolt Co. v. Rose.

open and destroys its effect as an estoppel. The judgment no longer effects a merger of the cause of action, and it does not bar a second action on the same demand."

To the same effect is Sec. 481 of Freeman on Judgments. See, also, Taylor v. Smith, 4 Ga. 133; Close v. Stuart, 4 Wend. 95; Trevor v. Wall, 1 Durnford & East, 151; Street v. Hopkinson, 2 Strange's Repts. 1055; Union National Bank v. Manistee Lumber Co., 43 Ill. App. 525.

The rule that a mere reversal by a superior court of the judgment of an inferior court for a plaintiff, is not a bar to another action, was recognized by the legislation of this State seventy years ago, perhaps before. See Sec. 9 of the Act of Limitations, in force June 1, 1827; Revised Laws of 1833; Sec. 12 of Chap. 46 of Revised Statutes of 1845, and Section 25 of the Statute of Limitations, in force July 1, 1873, which last named section is as follows:

"In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment is reversed or given against the plaintiff, and not after."

And see Section 4 of Chapter 16 of the Statute of James the First, entitled "An act for limitations of actions and for avoiding suits in law," which was the first statute of limitation as to personal actions known to English jurisprudence.

The rule as to the effect of the mere reversal by a superior court of the judgment of an inferior court is so well settled, that no doubt has arisen as to the consequence of such reversal by this court. It is only when, as in the present case, the final determination of the case by this court is the result, wholly or in part, of a finding of the facts concerning the matter in controversy different from the finding of

the court from which the cause was brought; and a finding of facts is therefore made by this court, that a question has arisen as to the effect of a reversal, with such finding of facts by this court. The finding of facts provided for by statute, and made in this case, is not a finding that is in any other suit in any way or wise conclusive upon the parties to the litigation, or can be given in evidence against or for either. It is a placing upon record, as provided by statute, certain reasons moving this court to the action taken by it, and is a determination upon which the Supreme Court acts in an appeal from the judgment in which such finding is made. The judgment of reversal is, notwithstanding such finding, the same as any other judgment of reversal without remanding, a thing which puts an end to the litigation in this cause, so far as this court can do so without concluding the rights of either party as to any future or other suit.

The judgment of the Superior Court is reversed without remanding the cause. A finding of facts will be here made.

This disposes of the present action, but will not be a bar to a future action for the same cause, if one shall be brought by the plaintiff.

Reversed, with finding of facts here.

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Illinois Central Railroad Company v. Joseph N. Butler.

1. **INSTRUCTION—*To Find for the Defendant.***—The court discusses the evidence in this case and reverses the judgment for the refusal of an instruction to find for the defendant.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1896. Reversed. Opinion filed March 8, 1897.

SIDNEY F. ANDREWS, attorney for appellant; JAMES FENTRESS, of counsel.

MUNSON T. CASE and W. S. JOHNSON, attorneys for appellee.

I. C. R. R. Co. v. Butler.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

What is said in some of the cases cited about the duty of courts to stand “firmly and fearlessly” is mere declamation; the duty of a court results from higher considerations than any consequences to itself from its judgments.

This is an action by a locomotive fireman, in the service of appellant, to recover damages for personal injury received by the explosion of the boiler of the locomotive April 4, 1892.

On the trial various theories of the cause of the explosion were advanced, and many witnesses testified why, in their opinion, the boiler exploded. Such testimony seems to be admissible under the decision in Camp Point Mfg. Co. v. Ballou, 71 Ill. 417, the witnesses being boiler makers, engineers, or otherwise having experience with engines and boilers; but still, if to qualify a witness to testify as an expert, he must have had experience in reference to the subject of his testimony, what witness was ever the observer of the phenomena attending the explosion of a boiler?

The only witness who testified to anything that happened at the time was the appellee, who said that the injector (a device that carries water into a boiler) was “working good”—the water glass (by which the quantity of water in the boiler should be shown) indicated sufficient water in the boiler—the steam was 140 pounds (to the square inch)—the speed thirty-five to forty miles an hour.

About two blocks (spaces between streets) from a place at which a stop was to be made, the engineer shut off steam (from going from the boiler to the cylinders), put on the air (applied the brakes), the boiler commenced to blow off (through the escape valve), steam ran up to 145 pounds, “the crown sheet (the top of the fire-box) gave way, and the steam and water, everything, blew out into the cab and blew me right out of the window.”

Other evidence leaves no doubt that the crown sheet did give way, but it is quite certain that that feature was not observed by the appellee before he was blown out of the window.

Considering only such evidence as relates to facts, and not

opinions, of why the explosion, there was evidence tending to prove that before the explosion the crown sheet had been in use about eight years; that between the stay bolts, which held it in place against the pressure of the steam, it was bagged or sagged; that at the heads of two or three of those bolts were leaks, known to the appellee; that those heads were thin; that at some former time sediment had collected and formed a crust upon the top of the crown sheet, but had been removed; that the crown sheet had been injured by heat; that the glass gauge and gauge-cocks, by which the quantity of water in the boiler might be ascertained, were not in condition to be relied upon.

The appellee had been fireman of that engine for several days before the explosion, and there is no evidence that a higher pressure of steam was carried at the time of the explosion than was usual; yet the witness whose opinion is most relied upon by the appellee testified that the heads of the bolts were so thin, in his words, "the rivets were so flat that they were not capable of holding a thirty pound pressure."

It is proved, not that the crown sheet tore or split, but was pushed off the bolts or rivets; as the appellee's brief says, "that the rivets were not strong enough to resist the pressure, is abundantly shown by the testimony of the many witnesses of appellant to the effect that the heads were off entirely." Several of those witnesses testified, not that the heads were off, but that the heads (which were conical, made so by riveting) were inverted or cupped.

Now, thick or thin, it is common knowledge that the iron or steel of which those heads were, would not have been cupped or inverted by being pulled through the crown sheet or by the crown sheet being pushed off from them, unless they were first made ductile, by being heated to a much higher temperature than they could have been with water on the top of the crown sheet, and the steam in the boiler at a pressure of 145 pounds.

The evidence as to the crown sheet is irrelevant; whatever may have been the defects in it, such defects had no connection with the explosion.

Reynertson v. Central Lumber Co.

It did not itself give way. It was forced down off the bolts. The bolts did not give way until they were heated beyond the temperature to which they could have risen, if water had stood upon the crown sheet. The conclusion is irresistible that the crown sheet was not protected by the water; and this may have resulted from a lack of water in the boiler or from a collection of sediment on the top of the crown sheet.

We do not overlook the testimony that there could not have been a lack of water, because soot was on the crown sheet, which would have burned off if there had been no water there. The witness who stated that circumstance went into the boiler after others had been there with kerosene torches after the explosion.

The engineer was the fellow-servant of the appellee. It was his duty to maintain in the boiler enough water for safety, and to keep the gauges in such order as would show the stage of water. If the explosion was from a lack of water, the appellant is not responsible. If it could, with any show of reason, be said that the overheating of the bolts was because of sediment on the crown sheet, then the appellee might recover, as the cleaning of the inside of the boiler was the duty of servants in another department of service; but there is no evidence of any sediment on the crown sheet at the time of the explosion.

The cause of the explosion can not, from the evidence in this record, be charged upon the appellant. *Sack v. Dolese*, 137 Ill. 129.

The judgment is reversed, specifically for the refusal of an instruction to find for the appellant.

Reyner Reynerston v. Central Lumber Company.

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1. JUDGMENT BY CONFESSION—*Vacation of, and Appeal*.—It is only for equitable reasons that the court in which a judgment is rendered can disturb it at another term, and it is only from an order denying a motion to vacate such judgment that an appeal or writ of error will lie.

2. COURTS—*Can Not Commit Error, When.*—A court can not commit error in denying a motion it has no authority to grant.

Motion to Vacate a Judgment.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

O'DONNELL & COGHLAN, attorneys for appellant.

ELMER H. ADAMS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion made in July, 1896, to vacate and set aside a judgment by confession, entered in April, 1896, because it was entered without authority. That it was entered without authority seems to be true; but that it was entered for a *bona fide* debt, three months overdue, seems also true. In such cases, irregularities meet but little consideration. Packer v. Roberts, 140 Ill. 9; Farwell v. Huston, 151 Ill. 239. And after the term at which judgment was entered has expired, the judgment is secure from attack therefor.

It is only for equitable reasons that the court in which the judgment is rendered can disturb it at another term; Knox v. Winsted Bk., 57 Ill. 330; and it is only from an order denying a motion to vacate that appeal or writ of error will lie. Werkmeister v. Beaumont, 46 Ill. App. 359.

A court can not commit error in denying a motion it has no authority to grant.

The judgment is affirmed.

Samuel P. Parmly v. Uriah B. Ferris and John H. Brown.

1. JUDGMENT—*Against the Preponderance of the Evidence.*—Where the clear preponderance of evidence is against the finding, the judgment based upon it will be reversed.

Parmly v. Ferris.

Assumpsit, for the price of laying a walk. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

HECKMAN & ELDON, attorneys for appellant.

DAVIDSON & TRUMBO, attorneys for appellees.

STATEMENT OF THE CASE.

This was an action in assumpsit, brought by the appellees in the Circuit Court of Cook County on the 12th day of June, 1894, to recover the contract price for laying 2,250 square feet of cement sidewalk, at eighteen cents per square foot. The contract arose from a written proposition of appellees, which was verbally accepted by Parmly Brothers, a firm composed of the appellant and one Henry C. Parmly, now deceased, which proposition was as follows:

“CHICAGO, June 26, 1891.

Parmly Brothers:

We propose to furnish all the labor and material necessary to complete the cement sidewalk six feet wide, on Seventy-sixth street, along your lot number 74, according to the specifications, plans and requirements of the city of Chicago, and complete the same in a first-class manner, including the packing, ramming or settling with water the loose sand filling, now being put in by Mr. Brown, for the sum of eighteen cents per square foot, and to guarantee the same for a term of ten years.

Very truly,

U. B. FERRIS.

JOHN H. BROWN.”

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question in the court below was: Did appellees comply with their contract?

The work was to be completed in a first-class manner.

One of appellees testified that he did not say it was a

first-class sidewalk; that it was a fair, ordinary walk, such as is being laid in Chicago by thousands.

Another witness for appellees testified that the walk, when finished, appeared to be a good, fair walk, as good as is usually built; in good condition every way.

The clear preponderance of the evidence is that the walk was never completed according to the contract.

The testimony as to the insufficiency of the walk is such that the opposing testimony was greatly overcome.

The judgment of the Circuit Court is reversed, and the cause remanded.

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Michael C. McDonald v. Lambert Tree and Anna J. Tree.

1. **GAMBLING—*Letting Premises For—Intention of the Landlord.***—The mischief intended to be prevented by section 127 of the Criminal Code, was not covenants by lessees that they would conduct gambling as a business, but the gambling itself, and one of the means of preventing that mischief is to punish the landlord who lets to a tenant premises which the tenant wants for gambling, and the landlord knows it, and knows with all the certainty that future events can be known that if he demises the premises will be used for gambling.

2. **SAME—*Intention of Landlord.***—An intention by the landlord to aid or assist the tenant to violate the law is not a prerequisite to his own guilt.

Assumpsit, on a guaranty. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

A. B. JENKS, attorney for appellant.

WILSON, MOORE & McILVAINE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action upon a guaranty by the appellant of the performance by the lessees and their assigns, of all the

McDonald v. Tree.

covenants to be performed by the lessess, contained in a lease in which the appellees were lessors.

The premises were eighty acres of ground expressed in the lease "to be used for a trotting park or race course, and the holding of exhibitions of like character, and for no other purpose or purposes;" and the lessees covenanted that they would "not use or suffer to be used the said premises, or any part thereof, for any illegal or disreputable purpose."

It is not a circumstance material to this decision—though this fact does appear in the case—that the lessees assigned the lease to the Garfield Park Club, and, as may be seen in Webber v. City of Chicago, 50 Ill. App. 110, we some years ago suspected that there was gambling on the races there. But, individually, I am now inexpressibly surprised and shocked to learn from this record that the appellant guaranteed the performance of their covenants by the lessees for the object and purpose of aiding them to obtain facilities for gambling.

We need not recite the special plea—the action, as permitted by the statute, is assumpsit; and under the general issue, the defense relied upon—illegality of the contract—is admissible. 1 Ch. Pl. 417, Ed. 1828.

At the instance of the appellees, the court, among other instructions, gave these:

"1. If you find from the evidence that the lease described in the declaration was executed by the parties thereto, and that the defendant McDonald entered into a contract to guarantee the payment of the rent in said lease provided, and that said rents have not been paid as in said lease promised, then you must find for the plaintiffs and against the defendant McDonald, unless the defendant has proved by a preponderance of the evidence, both that the lessees, at the time the lease was made, intended to put the premises to a use forbidden by law, and also that the plaintiffs in making the said lease knew of the said illegal intent on the part of the lessees, and participated and shared therein, and entered into the lease in question with the design and intention of enabling or assisting the lessees to accomplish their illegal purpose.

7. The court instructs you that even if it appears from the evidence that the plaintiffs at the time of the execution of the lease in question knew that the lessees intended to put the premises to an illegal use, nevertheless, the lease would be a valid contract and enforceable at law, unless the plaintiffs also intended, at the time the lease was executed, to aid and further the illegal purpose of the lessees, and executed the lease with that intent."

Others, of similar tendency, need not be repeated.

Special questions put by the court to the jury, with the answers of the jury thereto, are as follows:

"1st. Were the premises in question knowingly let by the plaintiffs to the lessees, in the declaration named, for the purpose and with the intent on the part of the plaintiffs of enabling the lessees to keep said premises as a place where persons were to be procured or permitted to assemble together for the purpose of betting on the result of horse races? They were not.

2d. Were the premises in question knowingly rented by the plaintiffs to the lessees, in the declaration named for the purpose and with the intent on the part of the plaintiffs, or Charles F. Gray, of enabling the lessees to bet money thereupon on the result of horse races? They were not."

We shall say nothing further about the evidence than that if the instructions quoted are wrong, the evidence was such as to make the error material.

Upon evidence of the conduct of business at the premises, as shown by this record, it has been decided that the secretary of this Park Club was guilty of the offense prohibited by Sec. 127 of the Criminal Code of 1874, and that the premises were a building and yard within that section. *Swigart v. The People*, 50 Ill. App. 181; 154 Ill. 284. Now, under that section, whoever "knowingly rents any such place for such purposes," *i. e.*, purposes of gaming, etc., as defined in previous parts of the section, is in the same category as he who executes the purposes. The purposes which the statute contemplates are not the purpose of the landlord, which usually is only to get his rent, but the purposes of the tenant as to the use he intends to make of

Schlesinger v. Allen.

the premises; and if the landlord knows the intention of the tenant, then the landlord, as he intends the natural and probable consequences of his own acts, intends that the tenant shall have the use of the premises for the—to the landlord—known purposes of the tenant. Under such circumstances, it is refining away the meaning of plain words to say that the landlord does not knowingly rent for the prohibited purpose of the tenant. We have held, and are still of the opinion, that to rent with knowledge that the place rented was to be used for the purpose of gambling, is to lose the rent. *Ryan v. Potwin*, 62 Ill. App. 134.

Such purpose by the tenant, and knowledge by the landlord, is all the mutuality required; the necessity of which we assumed in *Ryan v. Potwin*, 60 Ill. App. 637, where the case did not call for much consideration of the subject.

It would not be of a very high—yet fatiguing—order of intellectual labor to go through the multitude of cases cited by the respective parties—show the contradictions between them, and select those which we approve.

The mischief intended to be prevented by the statute was not covenants by lessees that they would conduct gambling as a business, but the gambling itself; and one of the means of preventing that mischief is to punish the landlord who lets to a tenant premises which the tenant wants for gambling, and the landlord knows it, and knows, with all the certainty that future events can be known, that if he demises, the premises will be used for gambling.

An intention by the landlord to aid or assist the tenant to violate the law is not a prerequisite to his own guilt.

The instructions were wrong, and the judgment is reversed and the cause remanded.

Leopold Schlesinger v. Benjamin Allen et al.

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1. **SOLICITORS—*Duty of in Preparing Decrees.***—It is the duty of solicitors obtaining orders and decrees in chancery, to prepare them and see that they are recorded, and they who neglect this duty can not complain if it is left undone.

2. INJUNCTIONS—*Orders for Should Appear of Record.*—An order made by the Circuit Court for an injunction should appear by an entry thereof by the clerk upon the record of the court.

3. SAME—*Void Orders.*—An order for an injunction in a suit pending in the Circuit Court signed by a judge of said court between seven and eight P. M., at his private residence, after he had been, during the day, sitting as a judge in the Criminal Court and not in the Circuit Court, is void.

4. COURTS—*Powers of the Judge After Adjournment.*—After a court adjourns for the day, the judge carries no judicial powers with him from the court room. An order for an injunction, signed by him at his lodgings after such adjournment in term time, is void.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded with directions. Opinion filed March 8, 1897.

MORAN, KRAUS & MAYER, attorneys for appellant.

PADDOCK, WRIGHT & BILLINGS, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

By the record of this cause it appears that, on file in the Circuit Court, is a bill in chancery, in which the appellees are complainants and the appellant, with others, are defendants, which bill bears indorsements as follows:

“RECOMMENDATION OF MASTER.

CHICAGO, ILL., August 22, 1896.

I have examined the foregoing bill and am of the opinion, upon a consideration of its allegations and the law, that the complainants are entitled to the injunction prayed for. I therefore recommend the following order.

Wm. FENIMORE COOPER,
Master.

ORDER OF INJUNCTION.

Let an injunction issue, as prayed for by the complainants, upon their giving the usual bond in the sum of \$2,500, to be approved by the clerk of the court.

FRANK BAKER,
Judge Circuit Court, Cook County, Illinois.”

Schlesinger v. Allen.

Following the bill is an injunction bond, but it does not appear that any further order was entered by the clerk, or that in fact any writ of injunction issued.

Undoubtedly, an order made by the Circuit Court for an injunction, should appear by an entry thereof by the clerk upon the record of the court. Sec. 14, Ch. 25, R. S.

But loose practice by one party should not be to the prejudice of his adversary. Such an order on the bill—which is part of the record—must be treated as *prima facie* the act of the court, notwithstanding the fact that the clerk has not written up the formal order upon the record.

The rights of parties are to be protected, however remiss the clerk. Walker v. Schum, 42 Ill. 462.

It is the duty of solicitors obtaining orders and decrees in chancery to prepare them and see that they are recorded. Schneider v. Seibert, 50 Ill. 284.

They who neglect that duty may not complain that they have left undone those things which they ought to have done. Stevens v. Coffeen, 39 Ill. 148.

We have heretofore treated orders so shown as appealable. Mexican Asphalt Co. v. Mexican Asphalt Paving Co., 61 Ill. App. 354; Board of Education v. Frank, 64 Ill. App. 367. In this record, however, it affirmatively appears by a certificate of evidence, that there never was any action of the court upon the application for an injunction—that the order was signed by the judge between 7 and 8 p. m., at his private residence, and that he had been, during the day, sitting as a judge in the Criminal Court and not in the Circuit Court.

It appears in Blair v. Reading, 99 Ill. 600, that the delusion that a court ambulates with a judge, has not been confined to this county. U. S. Life Ins. Co. v. Shattuck, 57 Ill. App. 382, 159 Ill. 610.

Judges do have, by statutes, certain powers conferred upon them to be exercised in vacation; such as granting injunctions and issuing writs of habeas corpus, but if any statute confers upon a judge any judicial authority in term time, other than such as results from the fact that he is at the head of the court, and then only while he is there at the head, such statute has escaped my notice.

It would seem to follow that the injunction in this case is void, and, as we understand the appellees' brief, it is their position that therefore an appeal does not lie.

It would not have been safe for the appellant to have disregarded the injunction, trusting to that understanding of the law by the counsel of the appellees and the Circuit Court, on a proceeding for contempt. The more doubtful the power, perhaps the greater the contempt in defying it. Here was the order, signed by the judge whose authority the clerk would hardly question, and constituting a part of the record.

Prima facie, it lacked putting into form by the solicitor and recording by the clerk. But if *Walker v. Schum*, 42 Ill. 462, is to be followed, as the record stood, it was an order of the court. Now—for matter extrinsic—it is shown to be void.

In such cases what the record shows as valid, may be reversed on appeal. *Cook v. Remick*, 19 Ill. 598, and cases there cited.

The order directing an injunction is reversed, and the cause remanded with directions to the Circuit Court to enter an order vacating the original order, and whatever may have been done under it.

Reversed and remanded with directions.

MR. JUSTICE GARY, on petition for rehearing.

This petition, as we understand it, is based upon three grounds:

First, that the order appealed from was, contrary to our decision, an order of the Circuit Court, as a court.

Second, that if not an order of the court, it was the order of the judge "in vacation."

Third, that if not an order of the court, we have nothing to do with it.

In the opinion filed, it was assumed that a reference to 57 Ill. App. 382, where was quoted from 102 Ill., the words, "A judge, therefore, has no judicial power outside of the court in which he officiates," was enough of authority upon that point. But there is more. In *Ling v. King*, 91 Ill.

Schlesinger v. Allen.

57, treating of a judgment by confession entered by the clerk in vacation, it is said: "If the entry of a judgment order is a judicial function, none but a judge could exercise it, and only in term time. A judge has no power, as an individual, to make orders, decrees and judgments, but that can be done only when he is acting as a court."

In *Rafferty v. People*, 72 Ill. 37, it is written: "It has been held by a court of the highest respectability that, when the court adjourns, the judge carries no powers with him to his lodgings, and has no more authority over the jury than any other person, and any direction to them from him, either verbal or in writing, is improper. *Sargent v. Roberts et al.*, 1 *Pickering*, 337. This is doubtless sound and judicious doctrine."

He "carries no powers with him to his lodgings," nor to his dinner table, nor to his stables.

But the petition says, "that to a very large extent, for over half a century, it has been the practice of the Circuit Court judges to grant writs of injunction during the period of their statutory terms out of court, in chambers, at their private residences, and in other places out of court, and to indorse such order upon the bill itself, as was done in this case."

A similar practice, followed by the judge who wrote the opinion deciding that it was erroneous, had prevailed in Massachusetts, as may be seen by reference to 1 *Pick.* 337.

We that be judges are prone to emulate, in one particular, the example of St. Paul, Romans 11, 13.

Ling v. King, supra, is cited with approval in *Conkling v. Ridgely*, 112 Ill. 36, which last case disposes of the suggestion in this petition, that over night is vacation.

The original opinion, by citing cases shows that what is on the record of a court as a judgment may be reversed on error, because the court of review will take notice of the law which makes it void. Is there less reason for reversing what is, by record *prima facie* an order of the Circuit Court, when, by extrinsic facts brought into the record, it is shown to be void?

The petition is denied.

John W. Hedenberg v. David W. Graham.

1. **VERDICTS—Who May Complain.**—A defendant may not be permitted to urge, as a ground for reversal, that the verdict was less than it ought to have been. It is only permitted to one that is injured by a verdict to complain of it.

Assumpsit, for physician's services. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

EDGAR BRONSON TOLMAN, attorney for appellant.

T. H. GAULT, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee to recover for professional services as a physician and surgeon. The defense was that of neglect of professional duty in the case in which the services were rendered. The claim was for two hundred and thirty-two dollars, and the jury returned a verdict for exactly one-half that sum, upon which the judgment appealed from was entered.

Whether or not, under the evidence, the appellee was guilty of neglect of duty, was a question of fact and not one of law, and it being determined in favor of appellee, then the further question of what was the reasonable value of the services rendered by him, became, likewise, one of fact and not one of law, and upon both questions we must treat the verdict as conclusive upon us.

A defendant may not be permitted to urge as a ground for reversal that the verdict was less than it ought to have been. It is only permitted to one that is injured by a verdict to complain of it.

It is assigned for error that an instruction asked by appellant was refused. While we do not think it would have

Hedenberg v. Graham.

been error to have given the instruction, it is plain that in substance the principle contained in it was sufficiently stated to the jury in other instructions that were given at appellant's request.

Perceiving no error in the record, the judgment is affirmed.

UPON PETITION FOR REHEARING.

In our original opinion we did not discuss, although we had considered, a question that is now reiterated with so much force as to persuade us that it is our duty to express our views upon it.

The case that was presented to the jury, by the evidence and instructions, was whether or not the appellee was guilty of a neglect of professional duty in the case in which his services were rendered, and for the rendition of which he sued to recover compensation. There was no question made by the appellant as to the reasonableness or amount of appellee's charge of \$232. The only defense was a neglect of professional duty by appellee to such an extent as to preclude his recovery of any sum whatever. It was a defense to the whole case, and not to a part of it, the appellant conceding that he was bound to pay all that was claimed, if anything.

And it was argued by appellant, in his original brief, as it is again in his petition for a rehearing, that if the jury believed appellee had not been guilty of neglect of duty, the verdict should have been for \$232, and could not properly have been for only one-half that sum, but if they believed he had been guilty of such neglect, then the verdict should have been for the appellant.

The law undoubtedly is, that if the appellee were guilty of neglect in the duty he had undertaken, he could not recover anything, and the jury were so instructed.

The situation, as claimed by appellant, is about this: that if the verdict against him had been for the full amount of \$232 it could not be disturbed, but being for only one-half that sum it may be.

It must be admitted that there is an inconsistency between the amount of the verdict and the facts of the case. For the law is, that if the fact was that there had been no neglect of duty by appellee he should have recovered the full amount of his claim, and if there had been such neglect he should have recovered nothing. By intendment of law a verdict settles in favor of the prevailing party every question of fact litigated at the trial. We must, therefore, regard the verdict as settling as a fact that appellee was not guilty of neglect of professional duty. And although urged to do so, we do not feel that we may say that, under all the evidence, such a conclusion is so clearly wrong as to justify us in setting it aside.

Was there, then, a violation of any rule of law by the jury, to the prejudice of appellant, which entitles him to have the verdict set aside because it was for a less amount than appellee was entitled to?

The question is more interesting than practical, and is not likely to often arise.

Exact justice is more theoretical than practical in the law's administration. It would be a practice full of mischievous consequences if appellate tribunals were to adopt as an established rule that cases should be remanded for another trial at the instance of the losing party, for the mere reason that if he were indebted at all he was indebted in a greater amount than the verdict found he owed.

Verdicts often appear to be, and doubtless are, the result of a yielding by one or more of the jurors to the views of their associates, and may properly be such, and unless it is quite plain that a verdict has been arrived at through improper compromises among the jurors, or as the result of some chance arrangement between them, whereby the individual judgment of the jurors has been sacrificed, or by other means destructive to a sense of deliberation, the verdict ought not to be disturbed for the single reason that its amount does not present a logical and consistent result of its other findings.

It would be pure speculation to attempt to show the

Pennsylvania Co. v. Kenwood Bridge Co.

processes through which the amount of the verdict was reached, and perhaps no one of the jurors whose verdict it was, could satisfactorily account for it, although it embodied his final conviction of what was the truth and right of the case.

It is enough if a verdict represents the final result of the combined deliberations and convictions of the whole of the jury, without any wrongful surrender of the individual opinion of each juryman, and in such case the verdict should stand, although it be logically inconsistent with some of their other findings.

The opinion of the court, at General Term, in *Wolf v. Goodhue Fire Insurance Company*, 43 Barb. 400, contains much that is applicable to the case at bar.

See, also, *Allen v. United States*, 164 U. S. 492.

We must continue to adhere to our former judgment, and therefore the petition for a rehearing is denied.

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170s 645

Pennsylvania Company v. Kenwood Bridge Company.

1. **JUDGMENTS—Warranted by Law and Evidence.**—A judgment warranted by the law and the evidence will be affirmed.

Assumpsit, for damage to merchandise. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

GEO. WILLARD, attorney for appellant.

BARKER & CHURCH, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit to recover for damage to merchandise, founded upon a shipping receipt or bill of lading given by the appellant to the appellee, as follows:

“GRAND CROSSING, December 20, 1892.

Received from Kenwood Bridge Company, by the Pennsylvania Company, the following articles, in apparent good order, to be delivered in like good order, without unnecessary delay, marked Schailer & Schinglau, care Illinois Steel Company, South Chicago, Illinois. Description: Three top sections of plate, weight 5,115; five bottom sections, weight 17,065; two top sections, weight 3,410. Total, 25,590. F. E. Sawyer, agent. Prepaid 5—12. Car 243, P. Y. & A.”

There is no question in the case as to the fact or amount of damage, and that it happened by attempting to cross a bridge with which the freight came in contact by reason of the load being so high. Many questions are made in the briefs upon the subject of evidence and instructions which we shall not consider.

If errors were committed, they are but theoretical. The right of the appellee to recover is clear, and we will follow the precedent, Merchant's Despatch v. Theilbau, 86 Ill. 71 and affirm the judgment. Affirmed.

Ignatz Hasterlik et al. v. Henry Sangerman.

1. APPELLATE COURT PRACTICE—*Affirmance on Insufficient Abstract.*—An abstract which does not show the matters upon which rulings of the court were excepted to, but merely refers to a page of the record for them, is insufficient.

Trover.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

BLUM & BLUM, attorneys for appellants.

Moses, Pam & Kennedy, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract states as the declaration what is a count in trover, and later says “trover, count and declaration dis-

West Chicago St. R. R. Co. v. Johnson.

missed by plaintiff;" yet neither in the Circuit Court nor here, by motion in arrest or assignment of error, is any want of sufficient pleadings made a ground of objection to the judgment.

The action seems to have been by the appellee against the appellants—plaintiffs in an execution—for directing, and against a constable for making, a levy of that execution upon property of the appellant, exempt from execution.

The brief of the appellants says, "there are several rulings to which exceptions were taken, but by far the most important one relates to the schedules. Of these, two were referred to in the testimony." The abstract shows no schedule, but refers to a page of the record for one. Schmitt v. Devine, 63 Ill. App. 289; City Electric Ry. Co. v. Jones 161 Ill. 47.

The insufficiency of the abstract is objected to in the brief of appellee, but the appellants have paid no attention to the objection. There is evidence fairly tending to show that the appellants directed the levy, and it was made, whether rightfully or wrongfully, we have no means of knowing.

Upon the question of the value of the property taken, there may be some uncertainty, but upon testimony which upon the trial was not objected to, the court, by requiring a remittitur down to \$250, seems to have been satisfied that that sum was not excessive, and we can not determine from the evidence whether it was or not. The appellee testified that "the stock was of all kinds of wines and liquors, about \$250 worth," besides cigars, tobacco, cigarettes and pipes. The presumption is that the judgment is right, unless it is shown to be wrong, and it is affirmed.

West Chicago St. R. R. Co. v. Clara Johnson.

1. **VERDICTS—Reached Under Improper Influences.**—A verdict reached under improper influences is not likely to command respect by the public or a restful submission by one against whom it is directed.

2. **SAME--Excessive—When Not Cured by a Remittitur.**—An excessive

69	147
72	31
69	147
79	200
79	256
69	147
85	459
69	147
a92	274
100	147

verdict, which is the result of passion and prejudice on the part of the jury, is not cured by a remittitur entered for the purpose of preventing the allowance of a motion for a new trial.

3. **TRIALS—Conduct of.**—A proceeding under the law to enforce a right or redress a wrong, having as its result the taking from one man of his property and giving it to another, is always a matter requiring the most solemn and deliberate consideration by the tribunal entrusted with such duty and responsibility.

Trespass on the Case, for personal injuries.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

ELA, GROVER & GRAVES, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee recovered a verdict of \$20,000 for personal injuries sustained by her through the alleged negligence of the appellant, and, one-half the amount thereof being remitted, judgment for \$10,000 was entered, and this appeal has followed.

The appellee was a passenger on one of appellant's grip-cars, and sat on the front seat next to the dash-board. The train, consisting of the grip-car and two trailers, came from the west on Madison street, and was destined to pass into State street upon the curved tracks at the intersection of such streets, and proceed northward along the tracks of the appellant located in the west half of State street.

At that time the many-storied building on the northwest corner of State and Madison streets was in process of construction, and the materials therefor were being delivered into the structure by means of wagons, which entered from State street through an archway or opening ten or twelve feet wide, located twenty or thirty feet north of Madison street. In order to make the entrance teams had to pull

West Chicago. St. R. R. Co. v. Johnson.

up an incline of about a foot, made of planks that covered the sidewalk, and which, presumably, began at about the curb line dividing the roadway from the sidewalk, and extended into the building. The radius of the curved tracks is not made to appear, but we infer that the curve, in the State street end of it, terminated about in front of the entrance into the building.

A large wagon loaded with tile to be used in the building had been standing upon the east side of State street, directly in front of the building, for about half an hour, waiting to be admitted to the building, and the driver being signaled to drive in, drove across the street at nearly right angles, and the hind wheel on the south side of his wagon was struck, and the wagon stopped and shoved, by the grip-car in question as it came round the curve. The wagon load weighed about sixty-five hundred pounds, and the tiles sloped upward from the wings of the sideboards of the wagon. When the collision occurred, some of the tiles were thrown off and a few of them landed in the front of the car where appellee was sitting, and she was struck by one or more of them and received the alleged injuries. The tiles weighed, when dry, about twenty pounds, and when wet about thirty pounds apiece, and one of them lodged and was found in appellee's lap.

Appellant has argued only four of the assigned errors, viz.: That the verdict was contrary to the evidence; the excessiveness of the damages; improper conduct of counsel for appellee; and the admission of incompetent evidence.

The appellee was a passenger and there is nothing to show that she was in any manner guilty of contributory negligence. She sat in her place by invitation of the appellant, and was entitled to the protection and safe carriage which the law gives to one so situated. Whether she suffered serious injury was one of the chief contentions at the trial, as it is here. The trial judge seems to have considered that matter, and perhaps also to have taken into account other elements which entered into the trial and are shown by the record, and to have required the appellee to remit one-half

of the verdict as a condition to giving judgment for the other half.

Upon a careful consideration of all the evidence, we do not find fault with the conclusion reached by the jury that the appellant was guilty of negligence, and that such negligence resulted in injury to the appellee.

Witnesses testified that the length of the wagon from the front end of the pole to the rear end of the wagon was from twenty to twenty-five feet.

When the collision took place, all of the wagon, except the furthest half of the hind wheels, was across the track. The gripman testified that he saw the team when it entered upon the track, and the evidence showed it was moving slowly, as it naturally would.

The wagon had an equal right with the cable train upon the street, and it was a mere question of fact whether or not it was negligence to so operate the train as to be unable to stop it in time to avoid the collision. It would seem that the exercise of reasonable and ordinary care in the operation of a cable train at such a crowded point as the place of the accident, would require it to be kept down to a rate of speed which would permit it to be stopped within the time that a slowly traveling team and wagon, twenty or twenty-five feet long, would reasonably require to pass over the tracks. The gripman saw the horses as they entered upon his track, and the team had to travel at least twenty feet before the hind wheel of the wagon could be struck by the grip-car. Under such circumstances, no nice measurement of chances should be taken by the operator of a train; and it was purely a question of fact for the jury to determine whether it was, or not, negligence for the train not to have been brought to a stand-still in time for the wagon to clear itself from the tracks.

But, coming to consider the question of the amount of the damages in connection with the means employed to produce them, we are confronted with a record which, in such respect, is remarkable, and, happily, not frequent.

It would seem that the trial judge, by requiring a remit-

West Chicago St. R. R. Co. v. Johnson.

titur of one-half the verdict, must have thought it was wrong to that extent, and while from a review of the evidence, we think he was clearly right in condemning the verdict to the extent that he did, we must look further to determine whether he should not have set it aside altogether.

When a verdict for twenty thousand dollars in a personal injury case be tainted by something which vitiates it to one-half its extent, it is a serious question if its other half may be ripened into a wholesome judgment—whether the vice that contaminated it to the extent of one-half did not permeate and invalidate the whole.

Certainly we, justifying the remittitur that was made, owe a duty to examine with great care the entire record upon which such action was based, in order to ascertain whether a verdict which was so bad in part should be sustained as to the rest of it.

A proceeding under the law to enforce a right, or give redress for a wrong, having as its result the taking from one man his money or property and conferring it upon another, is always a matter requiring the most solemn and deliberate consideration by the tribunal entrusted with such duty and responsibility.

The purpose, in part, for which courts are established, is that justice shall be administered, not alone with impartiality, but in an orderly manner, and whatever tends to thwart such an administration of justice operates to deprive a party to the suit of his right to "due process of law." One may not say that his property shall not be taken from him and bestowed upon another to satisfy a legal demand, but he may say it shall not be done except by "due process of law," and a fair trial by jury of the truth of alleged facts, upon the establishment of which depends the right to take his property from him, lies at the very foundation of the power of the law to divest him of his otherwise unquestioned right to keep what is his own.

Keeping such propositions in view, and having the record before us, it is impossible for us to say that the trial was such as the law contemplates should be had.

Nearly forty pages of the abstract are occupied by what are claimed to be objectionable and improper remarks and statements made by counsel for appellee in his closing address to the jury, and more than a hundred objections and exceptions thereto by appellant's counsel.

Interspersed among those pages are six notations of "laughter in the court room," "laughter," "laughter from the audience," "laughter," "laughter by the audience," and "applause by the bystanders," provoked by the wit or vituperation of appellee's counsel.

Against such conduct by the audience the counsel for appellant objected and protested.

We reproduce from the abstract the proceedings concerning the last two of such interruptions by the audience.

Immediately following the notation of an exception to the last preceding remark of appellee's counsel, the following appears:

"Judge Wing: He takes his exceptions a little more quietly than he used to. He is improving. Maybe he is losing his health. (Laughter by the audience.) Now, gentlemen of the—

Mr. Mason: I take an exception to the conduct of the bystanders, and the audience in the court room applauding the statement of Judge Wing.

Judge Wing: Finding fault—

Mr. Mason: I except.

The Court: Let's have one at a time, gentlemen.

Judge Wing: Finding fault with the audience as well as myself.

Mr. Mason: I want to enter my exception not only to the conduct of counsel, but of the bystanders.

Judge Wing: He finds fault with us for not suing the driver of the wagon; he finds fault with us for not suing the owner of the wagon; he finds fault with us for suing the cable car company; he finds fault with us for suing anybody at all; he finds fault with us for the way we try our case; he finds fault with our witnesses who come into court; he finds fault with the people who casually drop in here

West Chicago St. R. R. Co. v. Johnson.

to hear the trial, and I hope to God he will find fault with your verdict when it comes in. (Applause by the bystanders.)

Mr. Mason: I object, your honor, and take an exception."

And without any ruling by the court, counsel for appellee proceeded in his argument.

We shall refer, in detail, but to one more of the many occurrences in the course of the argument that is complained of. Many of the objections that were interposed were not well taken, although some were. Whether well made or not, the only apparent attention given to them by the court was an admonition to the counsel who was speaking, to confine himself to the record. We quote from the abstract:

"Judge Wing: I must bless that kind providence, because I know, and can appreciate, the keenness of her suffering if she could know of this disgraceful perjury that they have presented against her here of former abortions, and miscarriages without number, and lies unspeakable and unbelieved. A Catholic woman does not commit abortion.

Mr. Mason: Exception.

Judge Wing: Gentlemen of the jury—

Mr. Mason: Exception. I want to be heard and shall be heard.

Judge Wing: And I want to be heard all over Chicago.

The Court: Mr. Mason.

Mr. Mason: There is no evidence that this plaintiff is a Catholic woman, and I want to be heard upon this point.

Judge Wing: There is evidence that she is a Catholic woman.

Mr. Mason: I don't propose to be put in a position where I can not save my record in this case. There is not one vestige of evidence that the plaintiff in this case was a Catholic woman, and it would not have been proper to have even offered it, and it is not proper for you to state it.

Judge Wing: If it isn't here in the record I am willing to sit down. I can find it.

The Court: You must stand by your record.

Judge Wing (reading): 'Question.' Let me tell you how it happened; Mr. Furthman was standing right here and he said to me: 'Will you admit that this young man sitting here is F. E. Johnson?' and I said: 'Fred, you were married by a priest all right?' and Fred said 'Yes.'

A consideration of the whole argument, and the frequent jangling and quarreling of counsel concerning its propriety and truthfulness as applied to the facts of the case, and the disorder above referred to, deprived the trial of many characteristics which should always accompany a calm and deliberate attempt to arrive at an end which justice would approve of. To sustain such proceedings is to encourage them.

It seems to be true, as urged by appellee, that numerous of the objections interposed by appellant's counsel were not pressed upon the attention of the trial judge, and his rulings obtained thereon so as to form the basis of a legal exception but we are considering the question not wholly with reference to technical legal errors, but largely in the broader aspect of what amounts to an orderly and deliberate trial of the rights of one party as against the other.

To demand respectful and orderly submission to the law, it is but little less important that justice should have the semblance of being fair and impartial, than that it should be so in fact.

A verdict reached under improper influences is not likely to command respect by the public or a restful submission by one against whom it is directed.

The veriest criminal should not be subjected to the adverse result of an unfair trial, nor may the party to a civil suit be mulcted in damages under improper influences. We counsel and judges, whose pride in the law consists largely in the sense that it is duly administered, should be ever watchful of the dignity and majesty of its proceedings.

The question then recurs, if the verdict returned under such circumstances was bad to the extent of one-half, as it appears to have been in the opinion of the trial judge, should it be sustained as to the other half?

West Chicago St. R. R. Co. v. Johnson.

Our Supreme Court has spoken twice, at least, in very pertinent language about similar verdicts.

In Illinois Central R. R. Co. v. Ebert, 74 Ill. 399, which was a case of personal injury to a teamster whose team was killed and himself seriously crippled, disabling him from performing the labor to which he was accustomed, Mr. Justice Breese, in delivering the opinion of the court, said :

“The accident, then, having been occasioned by the negligence of the company, they must bear the consequences ; they must respond in damages. Were the damages properly assessed in the case ? Do the facts justify a finding so heavy ? Ten thousand dollars is a very large sum of money, in the possession of which very few can boast. It is a small fortune, which few acquire in a life of incessant labor. This the jury awarded to one whose prospects in life did not extend beyond his wages as a day laborer, and who has not been, by the negligence of the defendants, wholly disabled. It is true, the company were at fault, but not so greatly as to aggravate it to willfulness.

Compensatory damages were all the jury were justified in awarding, under the evidence. A verdict for \$10,000 is so enormous as to justify the inference the jury were actuated by prejudice and passion, not listening to the dictates of cool judgment. The enormity of the finding so shocked the sense of justice of the plaintiff’s counsel that they at once remitted more than one-half of the amount. (From \$10,000 to \$4,000.) We can not but think the verdict was the result of passion and prejudice, and it is none the less so after the remittitur, for the incentives to the finding abide as well in what remains as in the original amount found. The verdict was for \$10,000. That verdict was the result of passion and prejudice. If those incentives prompted the verdict they vitiate the verdict, and it should have been set aside. But a practice has found place in our jurisprudence which sanctifies an outrageous verdict by entering a remittitur, and it has so often received the sanction of this court that it may be too late now to displace it.” And the judgment for \$4,000 was affirmed.

VOL. 69.] West Chicago St. R. R. Co. v. Johnson.

Again, in Loewenthal v. Streng, 90 Ill. 74, a case of malicious prosecution, where a verdict for \$10,000 was remitted down to \$6,000, similar comment was made. In speaking of the verdict, the court said :

"It could only have been induced by prejudice, passion, or a total misconception of the case. And when it is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception. These elements may have entered, and probably did enter, into the finding of other facts important to the issue, if not the issue itself. Such feelings would naturally lead to an unfair finding against appellant." And there the judgment was reversed.

In the case of C. & N. W. Ry. Co. v. Cummings, 20 Ill. App. 333, this court said :

"While it must be said that by the law, as settled, it is in the power of the trial court to render judgments on verdicts reduced, as the one under consideration was, to an amount satisfactory to the trial judge, and the entering of such judgment is not error, yet the judgment so rendered is anomalous, and, in a reviewing court, can not be entitled to the presumptions which obtain in favor of a judgment upon a fair verdict, which results from concurrence upon all the issues by the jury and the court. In the exercise of the revisory power of this court we may reverse a judgment rendered under such circumstances as appear in the record, notwithstanding there appear to be no errors of law, where in our opinion such course will best tend to promote the impartial administration of justice. In view of all the circumstances shown by the evidence in this record, and the impeachment of the verdict by the trial judge, in which appellee concurred by entering a remittitur of so large a part of the verdict, we conclude that the better and more prudent course, the one most likely to conserve the rights of both parties, and approximate justice most nearly in the end, is to submit the issues between the parties to the consideration of another jury, and, that this may be done, the judgment will be reversed and the case remanded."

West Chicago St. R. R. Co. v. Johnson.

That was the case of an assault and battery committed by a brakeman of that appellant upon a passenger. The verdict was for \$2,000, from which \$1,400 was remitted and judgment given for \$600, and the judgment was reversed.

In a part of the opinion preceding the portion already quoted, the court said :

“The damages assessed by the jury were, according to the judgment of the court, more than three times greater than were justified. The damages were unliquidated, and there was no way in which the court could ascertain what part of the judgment (verdict) was for actual damages, and what for punitive damages. * * * A verdict * * * so excessive that seven-tenths of it will be remitted to prevent a new trial, can not but be regarded as the result of passion and prejudice on the part of the jury, and it is difficult to see how the vice in such a verdict can be cured by a remittitur, for the passion and prejudice was in the jury, and must have entered into and permeated the whole finding, and must abide in that which remains as well as in that which is remitted.”

We can not improve upon the language or reasoning of those cases.

Finding in the record, as we do, so much evidence of what is prejudicial to a cool and deliberate verdict, we are of the opinion that the trial judge ought to have set the entire verdict aside, and our duty is to send the case back for another trial.

We are not to be understood as condemning the practice, many times, and under some circumstances, most commendable, of the trial judge requiring a remittitur where, upon a fair hearing, a jury may, in his opinion, have exceeded reason and sound judgment in estimating the compensatory damages that one who is injured by the negligence of another, is fairly entitled to.

In passing upon this case we have not been unmindful of the difficulties and embarrassments under which a trial judge labors under our system of practice, nor of the manner in which, with the introduction of stenographers, bills

of exceptions are nowadays made up and approved. But we are required by the law to judicially believe that bills of exceptions duly certified, speak the truth, however much we may, as individuals, question their entire accuracy.

Upon the record as it is, we can not approve this judgment, and it is accordingly reversed and the cause remanded.

Samuel Jesselson v. Frank H. Griswold et al.

1. APPELLATE COURT PRACTICE—*Affirmance on Insufficient Abstract.*—The judgment is affirmed because the abstract of the bill of exceptions shows no exception to the denial of the motion for a new trial.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

BLUM & BLUM, attorneys for appellant.

SAMUEL H. TRUDE, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract shows that July 17, 1896, a jury was impaneled and returned a verdict for the appellees for \$77.82, on which judgment was entered.

It does not show whether the cause was called in its order upon the regular calendar of the court, or upon a short cause calendar; whether it was tried *ex parte*, or with both parties present and contesting.

What evidence was put in does not appear.

Whether the affidavit by the appellant as to merits, and of the clerk of the attorneys of the appellants as to the order of business in their office, were relevant to the question before the court on a motion to set aside the judgment, is only to be guessed at; and however meritorious the motion may have been, the abstract of the bill of exceptions shows no exception to its denial.

Thompson v. Economy Furniture Co., 64 Ill. App. 140, is in point, and the judgment is affirmed.

Rogerson v. Drucker.

William G. Rogerson et. al. v. Henry Drucker, Assignee.

1. **ERROR—In Denying Relief—What is Not.**—It is not error to deny the relief to which an applicant shows no title.

Assignment for the Benefit of Creditors.—Error to the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at the October term, 1896. Affirmed. Opinion filed March 8, 1897.

EDWARD J. WALSH, attorney for plaintiffs in error.

HAMLINE, SCOTT & LORD, attorneys for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The question argued by the parties is whether the provision for preferences for wages of laborers and servants, contained in Sec. 6 of the act of 1877, concerning assignments for benefit of creditors, is repealed, or other provisions made in substitution thereof, by the act of 1895 amending the act of 1887, to protect employes and laborers in their claims for wages.

This record does not show that the appellants complied with the conditions of either the one or the other of the statutes referred to. We may not say that the County Court erred in denying relief to which the appellants show no title. We do not consider mere abstract questions of law.

The order appealed from is affirmed.

John W. Gunnerson v. Gust Erickson.

1. **ACTIONS—Names of, Before Justices of the Peace.**—In actions before justices of the peace, the nature of the action is such as the evidence makes it.

2. **SET-OFF—Claims for Damages.**—A claim for unliquidated dam-

VOL. 69.]Gunnerson v. Erickson.

ages can not be set off against a claim based upon a contract totally disconnected with the subject-matter of such damages.

3. ACTIONS—*Forms of, when Optional Before a Justice.*—A plaintiff suing before a justice of the peace on a cause of action which would, had the case been commenced in the Circuit Court, have given him the right to have brought an action of trespass *de bonis asportatis*, or trover, or an action of assumpsit, has a right to decide whether he wishes to have his action treated as one of assumpsit or tort.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1896. Reversed and remanded. Opinion filed March 8, 1897. Opinion denying rehearing filed March 29, 1897.

STATEMENT OF THE CASE.

This was an appeal to the Circuit Court of Cook County from a judgment in favor of appellant, rendered by a justice of the peace, in an action said to have been in assumpsit.

Before entering upon the trial, in the court below, a notice of set-off for the sum of \$1.65 was served upon appellant's attorney and filed without objection.

The principal contention of appellant is that the trial court erred in allowing evidence in support of the set-off offered by the defendant.

J. W. RICHEY, attorney for appellant.

CHYTRAUS & DENEEN and CHAS. E. WYMAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In an action before a justice of the peace, there being no written pleadings or complaint, the nature of the action is such as the evidence makes it.

Appellant introduced evidence suitable to a case of trespass *de bonis*, or an action of trover. Appellee set off a claim arising from a contract.

Appellant was asking for a money judgment only, not for a return of any property.

Gunnerson v. Erickson.

Sec. 49 of Chap. 79 of the Statute, Justices and Constables, is as follows:

“In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his demands against the other existing at the time of the commencement of the suit, which are of such a nature as to be consolidated, and which do not exceed \$200 when consolidated into one action or defense; and on refusing or neglecting to do so, shall forever be debarred from suing therefor.”

The Supreme Court, in Bush v. Kindred, 20 Ill. 93, held that a claim for unliquidated damages could not be set off against a claim based upon a contract totally disconnected with the subject-matter of such damages.

To the same effect is the ruling in Hartshorn v. Kinsman, 16 Ill. App. 555; see also Pearson v. Bunker, 30 Ill. App. 524.

The damages for which this suit was brought did not arise from the contract under which appellee claimed a set off; that is, the damages did not naturally or proximately arise out of or follow such contract.

Appellant could not, by calling his action assumpsit, make it so; his claim being one for which an action of assumpsit would not lie. Had appellee sold the goods he wrongfully had, and received payment therefor, appellant might, waiving the tort, have sued in assumpsit; as it was, appellant's evidence showed that his cause of action was either trespass *de bonis* or trover.

The set off offered by appellee was improperly allowed.

The judgment of the Circuit Court is reversed and the cause remanded.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT UPON A PETITION FOR A REHEARING.

It is urged that as the evidence shows that appellee sold a portion of the cloth for \$22, and had a suit made from the remainder, therefore appellant's action must be considered as in assumpsit, and a set-off arising out of contract applicable thereto.

It does not follow, because appellee converted a portion of the goods into money, nor indeed would it had he so converted them all, that appellant would be compelled to bring, or that his action must be considered as, a suit in assumpsit. In assumpsit, appellant could recover only the amount received for the goods, while in trover or trespass he may recover the value of the property wrongfully taken.

There was evidence from which the finding might have been that the value of the goods sold by appellee was much greater than the sum for which they were sold. It is for appellant to decide whether he wishes, as to such goods, to have his action treated as one of assumpsit or of tort.

Appellee also urges that as appellant sued him before a justice of the peace "away out of the city in the town of Orland, while the record shows both parties to be residents of Chicago," and as upon the merits it has been established, not only that he has a complete defense to the claim, but that appellant owes him money, we ought to affirm the judgment. We do not think that it has been established that appellee has a defense upon the merits, while it does appear that appellant owes appellee.

If we were perinitted to equitably adjust all the differences this record calls to our attention, to decide this controversy in accordance with our personal opinions of what is right, or to follow what the public might approve, we should perhaps exercise such power wisely. As to this we can not say. We know that it is our duty to administer the law equally to all persons; that each party has a right to insist that it shall be so administered in this case.

We have no right to set aside the law and determine the rights of litigants by the peculiar bias which education, habit, association or faith may have given us.

Whether the rule of law which denies the right to set off damages arising out of contract, against those arising out of willful tort, be wise, is not now to be considered. The rule exists, is insisted upon, and must be enforced. The rights of appellee arising out of contract may be enforced in another action.

The petition for rehearing is denied.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—AUGUST TERM, 1896.

Cleveland, C., C. & St. L. Ry. Co. v. Edwin Capoot.

1. **RAILROADS—Duty to Fence Track.**—The fact that the convenience of the public requires that the right of way of a railroad company shall not be fenced on one side of the track, does not relieve the company from the duty to build a fence on the other side of the track, and it will be liable for any injuries resulting from a failure to do so.

Trespass on the Case, against a railroad for a failure to fence its track. Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

C. S. CONGER, attorney for appellant.

MUNDY & ORGAN, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant's track runs north and south on the west side of Allendale, an unincorporated village having a population of nearly 500, and Hill and Oak streets, which are 315 feet apart, run east and west across the track. The right of way between these two streets is not fenced on either side.

There is a strip of unoccupied ground ten feet in width on the east side of the right of way, and east of and adja-

VOL. 69.]C., C., C. & St. L. Ry. Co. v. Capoot.

cent to this strip is Railroad street, which is thirty feet wide and runs north and south, connecting with Oak and Hill streets at its extremities. Railroad street is the western boundary of the lots and blocks of the village.

A sow and four pigs, belonging to appellee, went upon the railroad track from the east at a point about midway between Oak and Hill streets, and were killed by one of appellant's trains. Appellee sued for the value of these animals. After the evidence had been heard, the jury was discharged by agreement, and the cause was submitted to the court for decision. The court rendered judgment in favor of appellee.

It was admitted upon the trial that the convenience of the public demanded that the right of way should not be fenced on the west side of the track where the company's land was used for storing ties and lumber which were to be shipped on appellant's road. *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 114; *T., St. L. & K. C. R. R. Co. v. Franklin*, 159 Id. 99; *C., C., C. & St. L. Ry. Co. v. Umphenour*, 63 Ill. App. 642.

The question before us is whether or not, under the circumstances, a fence should have been built on the east side of the right of way.

The statute is as follows:

"That every railroad corporation shall, within six months after any part of its line is open for use, erect and thereafter maintain fences on both sides of its road or so much thereof as is open for use, suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on such railroad, except at the crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are or may hereafter be laid out and platted into lots and blocks." *Starr & Curtis' Ann. Stat. (1896)*, Ch. 114, Par. 68. The remainder of this paragraph provides for the construction of gates or bars at farm crossings, and of cattle-guards at road crossings.

It is manifest that there is no exception in the foregoing statute which would exempt appellant from building a fence

C., C., C. & St. L. Ry. Co. v. Capoot.

between Oak and Hill streets on the east side of its right of way. But it is argued that the courts have made one exception by construction, and should now take another step forward and create another exception; that if the spirit of the statute does not require fencing where the public would be discommoded thereby, neither does it require fencing where the fence would not prevent stock from getting upon the track.

The fallacy of this proposition lies in the assumption that where only one side of the track is fenced, the fence is altogether useless. But a fence on one side may have the effect of stopping animals and turning them away from the track. A spirited horse may be driven more safely along a highway which adjoins and is parallel to the right of way, if a good fence intervenes between the animal and a passing train. In case the horse should become frightened and run, the fence might prevent it from dashing upon the track to its own destruction and the injury or death of its driver. Where it can be seen that such a fence might be useful in preventing animals from getting on the track, this court will not, by construction, put into the statute an exception which has not been mentioned by the legislature.

In I. C. R. R. Co. v. Trowbridge, 31 Ill. App. 190, the railroad track was laid for some distance on, in and along the south side of a public highway, by the license and permission of the public authorities, and it was held that the railroad company should have built a fence between its track and the remainder of the public highway. Mr. Justice Conger, in delivering the opinion of the court, says: "The object to be attained by the law in requiring railroads to be fenced, is to protect persons and property upon the railroad, and animals running at large, from being injured. In this case the ordinary dangers are greatly increased. For a mile and a half the highway and railroad run side by side, but a few feet apart, exposing persons passing along the highway with teams to the danger of collision with passing trains when such teams should become frightened and unmanageable."

Would the railroad company in the Trowbridge case have

VOL. 69.]C., C., C. & St. L. Ry. Co. v. Capoot.

been relieved from the necessity of fencing on the side next to the public highway if the public convenience had in fact required that the right of way should be left open on the other side? Certainly not.

By the same process of reasoning, we conclude that appellant's right of way should have been fenced on the east side between Oak and Hill streets.

The statute of Indiana requires the railroad track to be "securely fenced in;" and hence the opinion in I., B. & W. Ry. Co. v. Leek, 89 Ind. 596, which is based upon the Indiana statute, is not a controlling authority in the construction of the Illinois statute, which is differently worded, requiring the erection of fences on both sides of the road suitable and sufficient to prevent certain animals from getting upon the track. There is no intimation in the Illinois statute that if the object of the statute can not be fully accomplished, partial compliance with the mandate to fence will not be required.

The decision in the Leek case is based upon the railroad's convenience and the interest of the public.

But it has been held in this State that a railroad is not relieved from fencing its track on the ground of its own convenience and the safety of its employes. T., St. L. & K. C. R. R. Co. v. Franklin, *supra*. And it is difficult to see how the public interest demands that a railroad track should not be fenced on one side because it can not be fenced on the other. The reason assigned in the Leek case is, that animals crossing the track from the unfenced side would be caught, as if in a trap, by the fence on the other side, and perhaps be killed while endeavoring to recross the track.

But how can this court say that more, or more valuable animals would be killed with a fence on one side of the track only, than with no fence at all? This is not a matter of common knowledge, but of opinion or speculation merely. It is not a fact of which a court can take judicial cognizance. The question belongs to the legislature, and no exception of this sort should be engrafted upon the statute by construction.

The other errors assigned have not been argued, and will not be considered. The judgment is affirmed.

City of East St. Louis v. Flannigen.

City of East St. Louis v. Alexander Flannigen et al.

1. OFFICIAL BONDS—*General Rule Where Plaintiff has Misled Officer.*—The general rule is that the penalty of an official bond can not be invoked where the plaintiff has done anything directly or indirectly to mislead the officer.

2. CITIES AND VILLAGES—*Estoppel to Deny Validity of Directions to City Treasurer.*—A city should not be heard to complain that in pursuance of its own ordinances its treasurer accepted warrants of former years for licenses or treated funds claimed by the school authorities as part of the common funds of the city. He should not be required to overrule the judgment of the council as to whether such course could be safely pursued, nor should he be required to suffer if their action in that regard was irregular, unwise or illegal.

3. SAME—*Treasurer's Duty and Liability as to Anticipation Warrants.*—A city can not complain of its treasurer for not paying warrants drawn against future receipts not appearing on their face to be valid anticipation warrants, nor can it be permitted to insist that its treasurer was bound to know that such warrants were wrongfully drawn and recover from him if he did pay them.

Debt, on an official bond. Appeal from the Circuit Court of St. Clair County; the Hon. GEORGE W. WALL, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

FORMAN & WATTS, attorneys for appellant.

TURNER & HOLDER, attorneys for appellees.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

After a careful examination of the record in this case, the conclusions reached affecting the vital issues, and the reasons therefor, are fully set forth in the opinion of the learned judge who tried the case on the circuit, which opinion we adopt.

OPINION OF JUDGE WALL:

The ground of recovery mainly urged by the plaintiff is that the defendant Flannigen, as treasurer, misapplied the

funds received by him in that capacity, to a large extent, by paying the same on warrants issued during former years, when the funds of the city during his official term were not sufficient to meet necessary current expenses.

It appears that for a number of years the city was indebted beyond the constitutional limit, and the argument is, therefore, that a payment of warrants drawn under that general condition except out of the funds of the year against which the warrants were specially drawn, amounts to no payment whatever, and that the treasurer is in no respect discharged thereby, but that he and his sureties must respond to the city for any sum so misapplied. It seems to have been the view of the Appellate Court, when this case was before it on the pleadings, Vol. 34, p. 596, that such payments would not discharge the treasurer except when the payments are directed by the city, and then only to the extent of whatever surplus there might be of the revenues of the current year after paying all warrants drawn or to be drawn against such revenues.

Hence, counsel have sought to show whether there was any such surplus, which, by direction of the city, might be so used. On behalf of plaintiff it is insisted that the revenues of the fiscal year, 1885, were not sufficient to meet the current expenses, and that though the treasurer collected of the revenues of that year over \$42,000, he paid warrants of that year to the sum of less than \$35,000, and that he ought to account for the difference of over \$7,000.

As to the fiscal year 1886, plaintiff also claims that the revenues were insufficient, and that by similar calculation and process of reasoning the treasurer is chargeable with over \$29,000 in respect to the revenues of that year.

Thus it is sought to recover from him and his sureties, on his official bond, the sum of about \$37,000 because of this alleged misappropriation of the funds, by paying the warrants issued in former years out of the revenue of current years. On the other hand, counsel for defense insist that there was a surplus of revenue in each year, more than sufficient to cover all the warrants of former years so alleged to have been paid.

City of East St. Louis v. Flannigan.

As the respective calculations are each based upon the proofs, it will be found that the different results so reached are mainly due to the different treatment of two important items:

1st. The item of one-half of the money derived from dram-shop licenses, which by the city charter belongs to the local public schools.

This item for the two years, covered in part by the official term of defendant, approximated \$40,000.

2d. The item of current expenses which according to the position of plaintiff should include the interest on overdue coupons, amounting together for the year 1885, to over \$40,000, and for the year 1886 to over \$42,000.

For these interest dues no warrants were ever issued or ordered issued, except so far as judgments may have been obtained against the city on account of unpaid interest, and it appears that a part at least of the disbursements made by defendant was in payment of such a judgment.

As to the dram-shop license money, it is shown that the city, by ordinance passed before defendant was appointed treasurer and during the term of his predecessor, assumed control of the entire fund, provided that the same should be held as a part of the city funds and expressly prohibited the treasurer from paying any portion of the same to the schools.

This ordinance was in force during the whole of the defendant's term and until after his successor was appointed.

Indeed, by an ordinance passed not long before he retired from the office, it was provided that \$18,931.55, "now a surplus in the hands of the city treasurer, derived from one-half of the dram-shop license," be placed in the street and alley fund. Presumably, this was a part of the one-half which was claimed by the schools, and which the city had assumed to retain, and which it had forbidden its treasurer to pay to the schools. It also appears that during the whole of defendant's term and for years before there had been an ordinance in force making all city warrants receivable for licenses and all other dues to the city, and that during the

defendant's term an ordinance was passed making the warrants of 1885 receivable for licenses.

Why this latter ordinance was passed is not apparent, as its entire scope seems to be included within the provisions of an ordinance already in force. By virtue of the authority thus conferred and of the duty thus enjoined, the treasurer received large sums in the form of old warrants, which were payable generally or out of the revenue of particular years in payment for licenses. Just how much this amounted to is difficult to say, but from the entries in the "Funds Accounts" book, it was probably more than four thousand dollars; warrants issued prior to the years in which they were so accepted.

In all the treasurer did, it seems quite clear, he acted with the knowledge and consent of the then city government. His reports were approved from time to time as presented. Many of the payments which are now challenged were specifically ordered by the council, and his final report was accepted and approved and he was ordered to turn over the insignificant balance in his hands to his successor in office, which was done.

It is unnecessary to refer in detail to the various items particularly named in the fourth count of the declaration, since what has been said will apply to each of them as well as all other alleged misappropriations of the city funds. It is not claimed that the treasurer retained any of the funds or that he converted any part of the same to his own use.

* * * * *

It is argued by the plaintiff that the city council could not authorize or ratify an illegal use of the money; that the treasurer was charged with an independent function which he was bound to perform according to law, and that if he obeyed the ordinances or orders of the city council he did so at his peril. In other words, the council may by ordinance induce the treasurer to use and apply the funds in a particular way, and in the most formal manner approve such action, yet it may afterward sue and recover from the treasurer the amount so used if such use was in point of law unauthorized.

City of East St. Louis v. Flannigen.

The strength of this position depends somewhat upon the official character of the treasurer, and upon how far he is independent of the council, how far his power over the funds is limited by the authority of the council in that behalf and how far he is bound or permitted to disregard the directions of the council.

This is to be gathered from the facts as they appear in the record.

He was appointed by the council and gave the bond set out in the declaration. The condition of the bond reads as follows:

“The condition of this obligation is such that, whereas, the above bounden Alexander Flannigen has been duly appointed treasurer of the city of East St. Louis, by the city council, at its meeting April 20, 1886.

“Now, if the said Alexander Flannigen shall well and truly perform the duties of said office and promptly account for and turn over to his successor, or other person designated to receive the same, all moneys, books, papers, property and valuables coming to his hands as such officer, as directed by the city council, then this obligation to be void, otherwise to remain in full force.”

A question of construction is here presented—whether the words “as directed by the city council” apply to and qualify the whole condition, or merely the last clause.

There seems to be no more necessity for the phrase in respect to one clause than to another, and so the Appellate Court appear to have regarded it in the case of the City of East St. Louis v. Launtz, 20 Ill. App. 644.

That was an action against Launtz, the predecessor of defendant, brought in the name of the city, to recover for the use of the schools the one-half of the dram-shop license, which he had retained pursuant to the ordinance above referred to.

The treasurer set up as a defense that he had been expressly directed by said ordinance not to pay out any of said fund to the schools, and the court, in holding the defense valid, say that the condition of the bond, which was the same as

here, had not been broken, and that said "condition required the city treasurer to pay out the money in his hands, as such officer, as directed by the city council."

If this is the true construction, then the treasurer is to be regarded as the mere cashier of the city council, subject to its orders, having no independent official function, and of course protected by its orders to the extent, at least, that he is not to be called to account by the city for any act which it authorized.

And so he was regarded and treated in that case.

But a broader view may be taken of the subject. As was said by the Supreme Court, in the case of the same plaintiff v. Renshaw, 153 Ill. 498, "The general rule is well settled that the penalty of an official bond can not be invoked where the plaintiff has done anything directly or indirectly to mislead the officer."

There the question was as to the effect of an order requiring the payment of the money in the hands of the retiring treasurer to his successor, in the face of a former order requiring it to be paid to another person. Although the suit was brought for the use of another, the city was regarded as the plaintiff, and was held to be estopped from complaining that the treasurer obeyed its final order. That the rule as to estoppel, above quoted, is well settled can not be doubted, but the question is whether it is applicable here where the effect is to bar an action by the city to recover money paid out upon old orders or warrants which it is assumed were drawn upon a particular fund or the revenue of a particular year, and can not be paid out of the revenues of another year unless there be a surplus.

It would seem too clear for argument that the city should not be heard to complain that in pursuance of its own ordinance the treasurer accepted warrants of former years for licenses. He should not be required to overrule their judgment as to whether such course could be safely pursued, nor should he be required to suffer if their action in that regard was unwise, irregular or illegal.

So, also, as to the ordinance by which the council assumed

City of East St. Louis v. Flannigan.

to treat the entire amount of dram-shop license money as a part of the common funds of the city and prohibited the payment of any of it to the schools.

As was said in the Launtz case, it protected him from the complaint of the school officers, who sought to recover the money from him. It should also protect him to the extent that the city is estopped as to him to say that it was not a part of the common funds, and as such, subject to the payment of warrants the same as though it had been derived from some other source.

It seems to be argued, however, or to be assumed in the argument, that because the payments in question were illegal as claimed, the city could not be estopped to deny their legality, and in this action recover the money from the treasurer who had followed their express directions, or been misled by their conduct in that regard, and, therefore, it is urged that the city may now proceed as though no directions had been given and no such action had occurred.

This because the city council is but a limited agency and without the power thus to bind or estop a subsequent council. The proposition as thus advanced, in its application to the case in hand, is hardly to be defended. It may be assumed that the council referred to was fairly chosen, and that it represented the views of a majority of the municipality at that time, but whether so or not, it was invested with full representative power as a council.

Another council afterward chosen should not be permitted to deny what it did, for the purpose of recovering money from those who acted according to its express direction or were misled by its official proceedings.

The warrants which were paid, the amount of which the city now seeks to recover, were presumably issued for something of value the city received, and it would seem to be a case of gross injustice and intolerable hardship to permit the city, after having enjoyed what was represented and acquired by such warrants, to recover the amount thereof under the circumstances here disclosed and upon the ground urged.

VOL. 69.]

City of East St. Louis v. Flannigan.

The constitutional provision referred to should be used as a shield to protect the tax payer and, indeed, the municipality, against the enforcement of a contract entered into in violation thereof, but it should not be used as a sword by the city with which to scourge those who have relied upon its ordinances and obeyed its orders in the management of its affairs.

The general rule, that no man shall take advantage of his own wrong, is the foundation of the principle of estoppel *in pais*. Where parties are equally at fault in bringing about an unlawful result, it is said that the condition of the defendant is the better, and in such case the law will decline to interfere. Here, if there was an unlawful application of the corporate money, the city was as much to blame as the treasurer, and upon principle should not be allowed to take advantage of its own wrong in order to enforce its demand against the treasurer, who was no more culpable than the council. If this view is correct, the treasurer may well insist that the whole of the dram-shop license money shall be regarded as a part of the general funds for the purposes of this case.

As to the item of the annual interest upon the bonds of the city, and the interest upon past due coupons, it may be said that the city did not appear to regard it as a part of the current expenses and drew no warrants on account thereof.

For all practical purposes, the attitude of the city was that of repudiation so far as these bonds were concerned.

If it so acted, why should it expect the treasurer to act otherwise, and with what reason can it ask the law to regard it otherwise?

The city treated the interest item as no part of the current expenses, and whatever the reason may have been, it can not object if the same treatment of the matter should obtain in this litigation.

The question of estoppel as presented by this record, upon the effect of the ordinances above referred to, was not before the Appellate Court when the case was there. As already suggested, that court had for consideration only the plead-

City of East St. Louis v. Flannigen.

ings, and hence there seems to be nothing in its rulings to exclude the operation of estoppel in the case as it is now made up.

As has been said, the different results reached by counsel in their efforts to show that there was or was not a surplus, arise mainly from the different positions taken in regard to the one-half of the dram-shop license money and the interest on the city bonds, but this does not include all the matters in which counsel differ as to this branch of the case. * *

Recurring again to the principal feature of the case, it seems uncertain how many of the warrants, paid or unpaid, were so drawn as to their terms, or as to their dates with reference to taxes levied that they were valid anticipation warrants, and so of legal and practical value to the holders thereof, though what has been said assumed that all were so drawn.

But if so drawn, what further pecuniary interest has the city in that behalf, it being indebted beyond the limit; having merely exchanged the warrant for the thing received, and thereby having assigned so much of its revenue, but not being responsible for the payment of the warrant? If a warrant is not so drawn, can the city complain of the treasurer for not paying it, or, on the other hand, can the city be permitted to insist that the treasurer was bound to know it was wrongfully drawn, and recover from him if he did pay?

Must the treasurer know more than the city about its own affairs, and may the city hold him to account for not correcting its errors?

And in either case, can the city for its own use recover substantial damages for the supposed misapplication of the funds, even if it is not estopped to make the demand. As no direct argument has been made upon the point last suggested, it is not deemed necessary to do more than call attention to it and to some of the adjudications which may bear upon it. City of Springfield v. Edwards, 84 Ill. 626; Law v. The People, 87 Ill. 385; Fuller v. City of Chicago,

VOL. 69.]

Lagow v. Robeson.

89 Ill. 282; Howell v. The City of Peoria, 90 Ill. 104; City of E. St. L. v. Flannigan, 26 App. 449.

On consideration of the whole case, the conclusion is that finding and judgment should be for defendants.

The judgment is affirmed.

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William A. Lagow et al. v. William N. Robeson.

1. DRAINAGE COMMISSIONERS—*Requisites of Order Substituting One Commissioner for Three.*—An order reciting that the court examined a petition for the substitution of one drainage commissioner in place of three, and heard evidence thereon, and finding that the petition is signed by a majority of the land owners representing a majority of the acreage embraced in the district, and that at the time of and long prior to the filing of the petition, the drains, ditches and levees, for the construction of which said drainage district was organized, had been fully completed, is sufficient to empower the court to order the appointment prayed for.

2. APPEALS—*From the County Court—How Taken.*—A County Court is a court of record, and the mere making and filing of an appeal bond approved even by the judge out of court, without praying for and having the appeal granted, or fixing the time within which the appeal bond is to be filed is not sufficient, and such an appeal should be dismissed by a court of appeal.

Petition, for substitution of one drainage commissioner for three. Appeal from the Circuit Court of Lawrence County; the Hon. E. D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

GEE & BARNES, attorneys for appellants.

W. F. FOSTER, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

On the 29th day of January, 1895, a petition signed by a number of the owners of lands in the Russell & Allison drainage district was presented to the County Court of Lawrence county, for the appointment of appellee as commis-

Lagow v. Robeson.

sioner of said district, to be the only commissioner thereof, in place of appellants, who were then the three drainage commissioners, and praying that two of said three commissioners be dispensed with. The aid of the court was asked under and by virtue of the power granted by Sec. 62 of the Statute, Chap. 42, p. 1533, Starr & Curtis, 2d Ed., Rev. Stat., which provides, "that at any time after the drains, ditches or levees, for the construction of which the district was organized, have been finally completed, the court may, on petition therefor as aforesaid, dispense with two commissioners, and thereafter appoint for such district but one commissioner, to hold office for the term of three years from his appointment, and until his successor is chosen and qualified, and he shall perform the duties and exercise the powers theretofore vested in and imposed upon the three commissioners of such district." No notice was served upon the commissioners of the proceeding, nor do we understand such notice was required by the statute. The court made an order finding from the evidence that said petition was signed by a majority of the land owners, representing a majority of the acreage embraced in the said drainage district, and that at the time of, and long prior to the filing of the petition, the drains, ditches and levees for the construction of which the said drainage district was organized, have been finally completed.

The prayer of the petition was granted and appellee was appointed sole commissioner of said district, and the appellants, former acting drainage commissioners of the district, were required and ordered to report to the court, and settle up their business with said drainage district, and turn over to appellee all the property, books, money and effects in their hands or possession, belonging to said drainage district, and written notice by the clerk, through the sheriff, ordered to be served upon them. Appellee accepted the appointment and took and filed, as the law required, his oath of office. The notice to appellants, as ordered, was also duly served.

On February 4, 1895, appellants filed an appeal bond with

the county clerk, which was approved by the county judge on the same day, but they made no appearance and took no steps in the County Court to set aside said order, nor were any exceptions there taken to the ruling of the court.

There are but two errors assigned, viz.: "The County Court erred in appointing William N. Robeson sole commissioner of the Russell & Allison Drainage District;" and "the Circuit Court erred in dismissing the appeal taken by appellants from the County Court to the Circuit Court."

If we are governed by the recitals of the record, the first error is not well assigned. It appears the petition was such as the law required, and gave the County Court jurisdiction to hear evidence and act in the matter as prayed for. The order recites that the court did examine the petition and the number of signers, and the number of acres owned by each and all of said signers, and the evidence as to the completion of the drains, ditches and levees in the said district, and finds the petition is signed by a majority of the land owners, representing a majority of the acreage embraced in the said district, and that at the time of and long prior to the time of filing the petition, the drains, ditches and levees for the construction of which said drainage district was organized, had been finally completed. These facts having been so found, were sufficient to empower the court to do as it did, and order the appointment of appellee as sole commissioner.

Two other questions are presented: 1st. Does an appeal lie from this order to the Circuit Court? And 2d. Was there an appeal properly taken in this cause from the County Court?

Appellants contend that appeals may be taken from this kind of an order of the County Court to the Circuit Court under the provisions of Sec. 122, of Chap. 37, Rev. Stat., which was partially repealed by the statute of 1887, which act provides that appeals and error shall lie from final judgments and decrees of County Courts to the Appellate Court of the appropriate district, in all cases except felonies and cases involving a franchise, or freehold, or the validity of a

Wilkey v. Buck.

statute. But if the said contention is conceded to be the law, and we do not wish it understood that we so hold, yet the important question remains, was this appeal properly taken from the order of the County Court?

The evidence taken and heard by the court upon which it granted the prayer of the petition, and made the order complained of, is not preserved in the record, and was not brought before the Circuit Court. No exceptions to any ruling of the County Court were taken during the hearing and no appeal was prayed for or granted from the County Court. The County Court is a court of record, and the mere making and filing of an appeal bond, approved even by the judge out of court, without praying for or having an appeal granted, or fixing the time the appeal bond is to be filed, is not sufficient, and the appeal was properly dismissed by the Circuit Court.

The judgment is affirmed.

J. L. Wilkey v. M. E. Buck.

1. **APPEALS—Lie Only from Final Judgments.**—Appeals to this court from Circuit Courts will lie only in causes where a final judgment or decree has been entered.

Replevin, before a justice of the peace. Appeal from the Circuit Court of Hamilton County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Appeal dismissed. Opinion filed March 3, 1897.

J. WILSON JONES, attorney for appellant.

T. B. STELLE and J. R. CROSS, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.
It does not appear in the record filed in this court that any judgment was entered by the trial court, hence, as appeal will only lie from the Circuit Court to this court in causes where a final judgment or decree is entered against the appellant, the appeal is dismissed.

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Baltimore & O. S.-W. Ry. Co. v. John Derr, Adm'r, etc.

1. INSTRUCTIONS—*The Rule as to Accuracy.*—While it is true that there are many cases holding that an error in one instruction may be cured by a correct statement of the law in another, in a case which is close on the facts, the instructions, as a rule, should all state the law accurately.

2. SAME—*Inaccuracies in—When Cured by Other Instructions and When Fatal.*—The law is, that if an instruction is too broad, or too restrictive, or is doubtful, or leaves room for improper inferences, it may be cured by another instruction; but if given on a vital question, such as the exercise of care by the plaintiff suing for personal injuries, and the evidence is conflicting and doubtful, then it should be correct in itself, without reference to others in the series or to those of the opposite party.

3. ORDINARY CARE—*By the Plaintiff Essential in a Personal Injury Case.*—In a personal injury case, an instruction saying to the jury, "if you believe from the evidence in this case, if the defendant had complied with the law the accident would not have occurred, then you should find for the plaintiff," entirely omits the element of care on the part of the plaintiff, and is therefore erroneous.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

PALMER, SHUTT & LESTER, attorneys for appellant.

GEE & BARNES, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for damages on account of the death of his intestate, caused, as alleged, by the negligence of appellant; 1, in the improper operation of its train at a highway crossing; 2, in failing to give the statutory signal for such crossing, whereby said intestate was killed in attempting to pass over the same, while in the exercise of due care.

The accident occurred in the day time, in a collision with

B. & O. S.-W. Ry. Co. v. Derr.

a regular train, that was a few minutes behind time, at a country public crossing. There is no evidence of common law negligence in the operation of the train. The evidence, however, supports the averment of a failure to give the statutory signal. Giving full weight to the evidence favorable to appellee, the question, as to the exercise of due care and caution on the part of deceased, is close. In such cases the uniform rule in this State is, the instructions should be accurate. The law is that if one instruction is too broad—*Chicago v. McDonough*, 112 Ill. 85—or too restrictive—*Belt v. People*, 97 Ill. 461—or is doubtful—*Latham v. Roach*, 7½ Ill. 179—or leaves room for improper inferences—*Anderson v. Donaldson*, 32 Ill. App. 404—it may be cured by another instruction; but if given on a vital question, as to the exercise of care—*T. W. & W. Ry. Co. v. Larmon*, 67 Ill. 68; *Manufacturing Co. v. Ballou*, 71 Ill. 417; *Quinn v. Donovan*, 85 Ill. 194; *Wabash, St. L. & P. Ry. Co. v. Rector*, 104 Ill. 296—or if the element of such case is not incorporated when it should be—*C., B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88—or if given on the vital question of comparative negligence—*C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Wabash R. R. Co. v. Henks*, 91 Ill. 406—and the evidence is conflicting and doubtful, then each instruction should be correct in itself, without reference to others in the series or to those of the defendant.

The fifth instruction given for the plaintiff laid down the law that it was the duty of the defendant to give the statutory signal; “and if you believe in this case, from the evidence, if the defendant had complied with the law the accident would not have occurred, then you should find for the plaintiff.” This instruction entirely omits the element of care on the part of deceased, without which there would be no liability, notwithstanding such neglect. In the *Harwood* case, *supra*, an instruction on the same point, omitting the element of care, was condemned, and on account thereof the cause was reversed, though there were other proper instructions as to care. The element of care is also omitted in the eighth instruction given for the plaintiff. It attempts

VOL. 69.]Consolidated Coal Co. v. Rainey.

to state the doctrine of comparative negligence, which is no longer in force in this State—L. S. & M. S. Ry. Co. v. Hessions, Adm'x, 150 Ill. 546—and omits the element of care, which was essential in such a statement. C., B. & Q. R. R. Co. v. Johnson, Adm'r, 103 Ill. 512; City of Peoria v. Simpson, 110 Ill. 294. It also omits the element of comparison, which is the very essence of the rule of comparative negligence. C. & N. W. Ry. Co. v. Dimick, Adm'r, 96 Ill. 42; E. St. L., P. & P. Co. v. Hightower, 92 Ill. 139; Moody v. Peterson, 11 Ill. App. 180; Chicago & E. I. R. R. Co. v. O'Connor, 13 Ill. App. 62; Gardner v. C., R. I. & P. Ry. Co., 17 Ill. App. 262.

It is true there are a number of cases holding an error in one instruction is cured by a correct statement of the law in another, but where the case is close on the facts the rule stated is believed to be well established.

In the Dimick case, *supra*, on page 47, it is said: “Where a case is close in its facts, the instructions should all state the law accurately. The jury, not being judges of law, are as likely to follow a bad instruction as a good one.”

For the errors indicated, the judgment is reversed and the cause remanded.

Consolidated Coal Company v. Jefferson Rainey.

1. CONTRACTS—*An Agreement of Renewal of a Lease Construed.*—A lease to a coal company was extended for one year “under the same terms and conditions, except that the guaranteed royalty shall not be less than \$600 per annum.” The original lease guaranteed a royalty of \$250 per annum and provided that if any accident should happen to the mine, or if the workmen employed therein should strike so that the mine could not be operated, the guaranteed royalty should be reduced proportionately. *Held*, that this provision did not apply to the contract of renewal.

Assumpsit, for royalties. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

Consolidated Coal Co. v. Rainey.

CHARLES W. THOMAS, attorney for appellant.

DILL & SCHAEFER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit in assumpsit was brought by appellee against appellant, and by agreement of the respective parties a jury was waived, the cause was tried by the court, and a finding and judgment in favor of appellee for \$233.93 and costs was entered. The right to recover was based upon the written renewal of a lease for the term of one year from May 1, 1894, to May 1, 1895, which renewal was as follows: "It is agreed and understood by the parties to the within lease that the same shall be extended under the same terms and conditions, except that the guaranteed royalty shall not be less than six hundred (600) dollars per annum, for the term of one year from May 1, 1894, to May 1, 1895." It was admitted by appellant at the trial that \$366.07 was the whole amount of the royalty paid to plaintiff for that year, but on behalf of appellant it is insisted the trial court erred in refusing to hold as the law the following proposition submitted on its behalf: "The court is requested to hold that the indorsement of renewal made upon the lease ought to be construed so as to give defendant the benefit of the terms and conditions of clause seven thereof, and if the court believes from the evidence that for a number of days between May 1, 1894, to May 1, 1895, the workmen engaged in and about the mine in the lease mentioned struck and refused to work, so that the mine could not be operated for that reason, then no royalty should be charged to defendant for the time covered by said strike." This proposition was properly refused, and the court correctly construed the agreement for renewal to mean that \$600 was the minimum rental to be paid for the year therein mentioned. Of this sum only \$336.07 had been paid, and judgment for the balance of the \$600 was properly entered. The judgment is affirmed.

Phoenix Insurance Co. v. S. A. Hedrick.

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1. **APPEALS—Record Should Contain Copy of Bond, and Show Approval Thereof.**—A record filed in this court must contain a copy of the appeal bond, in order that this court may see whether the appeal has been properly perfected, and the record should show that the bond was duly approved within the time fixed by the court.

2. **SAME—Bond Must be Approved and Filed Within the Time Required.**—A defective appeal bond, if approved and filed in apt time, may be amended; but if the bond, whether sufficient or insufficient, is approved or filed after the time fixed by the court, there is an absolute failure to perfect the appeal, which can not be cured.

3. **SAME—May be Dismissed by the Court, of its Own Motion, in a Proper Case.**—The Appellate Court may, of its own motion, dismiss an appeal when the same has not been perfected in accordance with the order of the trial court.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Richland County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Appeal dismissed. Opinion filed March 8, 1897.

LYNCH & BUNCH and R. W. BARGER, attorneys for appellant.

PARKE HUTCHINSON and R. S. C. REAUGH, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The section of the practice act which allows appeals to this court requires that the party praying the appeal "shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is prayed, bonds in a reasonable amount to secure the adverse party, to be fixed by the court, with sufficient security, to be approved by the court." Practice Act, Sec. 67.

No appeal can be perfected under this section unless the bond is approved, and such approval must be by the court.

Phoenix Insurance Co. v. Hedrick.

Under Sec. 68 of Practice Act, the court may empower the clerk to approve the bond by an order to that effect made at the time when the appeal is prayed, and entered of record.

The record filed in this court must contain a copy of the appeal bond in order that this court may see whether or not the appeal has been properly perfected. *Pickering v. Mizner*, 4 Gilin. 334; *Leach v. The People*, 118 Ill. 157; *Heffron v. Rice*, 50 Ill. App. 332.

For the same reason the record should show affirmatively that the appeal bond was duly approved within the time fixed by the court. A defective bond, if approved and filed in apt time, may be amended; but if the bond, whether sufficient or insufficient, is approved or filed after the time fixed by the court, there is an absolute failure to perfect the appeal, which can not be cured by an order *nunc pro tunc*, or in any other manner. *Dingler v. Strawn*, 36 Ill. App. 563; *Ettelson v. Jacobs*, 40 Id. 427; *Case v. Spiegel*, 44 Id. 588.

The order in this case, as shown by the record, is, that the defendant should give bond within thirty days with security to be approved. This order confers no power upon the clerk to approve the bond, and the same must be approved by the court under the statute above referred to. But there is nothing in the record to show that the bond has been approved either by the clerk or the court. Therefore no appeal to this court has been perfected.

It is well settled by the decisions of the courts, that the Appellate Court may, of its own motion, dismiss an appeal when the same has not been perfected in accordance with the order of the trial court. *Fanning v. Rogerson*, 142 Ill. 478; *Chicago Sash, Door and Blind Mfg. Co. v. Shaw*, 39 Ill. App. 260; *C., B. & Q. R. R. Co. v. Evans*, Id. 261.

That the proper practice in such case is to dismiss the appeal is shown by *Pardridge v. Morgenthau*, 157 Ill. 395.

The appeal is dismissed at appellant's costs.

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W. H. Blackman et al. v. J. S. Lewis.

1. APPELLATE COURT PRACTICE—*Appellees Must File Briefs.*—Under the rules of this court the judgment will be reversed if the appellee fails to file a brief.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1896.

CHOISSER, WHITLEY & CHOISSER, attorneys for appellants.

No appearance for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

No briefs on behalf of appellee have been filed in this court, and, under rule 31, providing if appellee shall fail to file his brief the judgment will be reversed, we reverse the judgment and remand the cause.

John W. Mitchell v. Mackey-Nisbit Co.

Same v. Same.

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1. PRACTICE—*Rulings Must be Objected to and Exceptions Taken if They are to be Questioned on Appeal.*—Where the bill of exceptions does not show that the court held, or refused to hold, any proposition of law, or that any motion for a new trial, or in arrest of judgment was made, or that any exception was taken to the judgment or finding of the court, the judgment must be affirmed on appeal. And an exception to a judgment in the judgment order is the same as no exception at all.

Assumpsit, on promissory notes. Appeals from Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

MARSH & TINCH, attorneys for appellant.

Mitchell v. Mackey-Nisbit Co.

CHOISSEUR, WHITLEY & CHOISSEUR, attorneys for appellee;
D. C. GIVENS, of counsel.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The records in these two cases are essentially the same except as to the amounts recovered.

Each case was tried by the court without a jury.

In neither case does the bill of exceptions show that the court was requested to hold, or did hold or refuse, any proposition of law, or that any motion for a new trial or in arrest of judgment was made, or that any exception was taken to the findings or judgment of the court. An exception to the judgment in the judgment order, but not in the bill of exceptions, is the same as no exception at all.

There is but one exception on the part of appellants to the rulings of the court as to the admissibility of evidence, and that is concerning a matter which in no manner affects the decision of the cases.

There being no question before us for consideration, the judgment in each of these cases is affirmed.

Mobile & Ohio R. R. Co. v. Anton Langsdorf, Jr.

1. **VERDICTS—When Conclusive.**—The credibility and weight to be given to the testimony of witnesses is a matter for the jury to determine, and their decision is final, unless passion, prejudice or partiality appear to have governed their action, or unless an error of law is shown to have been committed by the court during the trial.

Trespass on the Case, for personal injuries and injuries to personal property. Appeal from the Circuit Court of Monroe County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

LANSDEN & LEEK and CHARLES MORRISON, attorneys for appellant.

RICKERT, GAUEN & WINKELMAN, attorneys for appellee.

VOL. 69.]M. & O. R. R. Co. v. Langsdorf.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

In this suit by appellee against appellant, brought to recover damages for personal injuries and the destruction of and injury to certain personal property, resulting from a collision between appellant's train and appellee's team and wagon, the jury returned a verdict for plaintiff and assessed his damages at \$300; defendant's motion for a new trial was overruled and judgment was entered on the verdict for \$300 and costs.

This appeal is taken from that judgment and appellant claims it ought to be reversed on the ground alone "that the judgment is not sustained by the evidence." No objection is made to any ruling of the court upon the admission, or refusal to admit evidence, or to the giving of instructions; nor that if the plaintiff was entitled to recover, the damages assessed were excessive. But it is contended that the negligence averred, which was that the bell was not rung, nor the whistle blown, to warn appellee of the approach of the train, was not proven, and if the proof did establish that fact, yet he was guilty of such contributory negligence in approaching the track, without exercising due care to discover the approach of the train, that he ought not to recover. Ten instructions, all that appellant requested, were given. Nine of these informed the jury that appellee must show by the evidence that he used reasonable care for his own safety; that it was not enough to prove the bell was not rung, or that the whistle was not blown upon defendant's locomotive engine for the distance of eighty rods before said engine reached the highway crossing, but it must also be shown that the failure to ring the bell, or sound said whistle, was the cause of his injury. The only question presented is one of fact, and we find in the record the evidence of several witnesses showing no signal was given, either by ringing the bell or sounding the whistle on the engine, to warn appellee of the approach of said train, and he testified he looked both ways, up and down the track, as he approached it, and neither saw nor heard the train. He was not contradicted as to this fact.

Belleville Pump & Skein Works v. Bender.

We think the evidence was sufficient, if true, to establish all the necessary facts justifying appellee's right to recover, including the fact that he used ordinary care for his safety in approaching the track. The credibility and weight to be given to the testimony of the various witnesses was a matter for the jury to determine, and their decision is final, unless passion, prejudice or partiality appear to have controlled their action, or unless an error of law is shown to have been committed by the court during the trial. St. L., A. & T. H. R. R. Co. v. Will, 53 Ill. App. 649; Stinchfield v. Chicago, 60 Ill. App. 338; C. & South Side R. R. Co. v. Lackman, 62 Ill. App. 437, and cases there cited; C., C., C. & St. L. Ry. Co. v. Ahrens, 42 Ill. App. 434; Penn. Co. v. Frana, 112 Ill. 405; C. & A. R. R. Co. v. Adler, 129 Ill. 341; Pullman Palace Car Co. v. Laack, 143 Ill. 258; Cicero Street Ry. Co. v. Meixner, 160 Ill. 320; C., C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328; C. & A. R. R. Co. v. Sanders, 154 Ill. 431.

We find the judgment was sustained by the evidence, and no sufficient reason for reversal appears.

The judgment is affirmed.

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Belleville Pump & Skein Works v. Henry Bender.

1. **INSTRUCTIONS—Accuracy Required.**—In a case which is very close on the facts, the instructions should be accurate, and especially so where the evidence is so evenly balanced that it would support a verdict either way. Inaccuracy on one side in such a case will not be cured by accuracy on the other.

2. **MASTER AND SERVANT—Duty of the Master in Providing Machinery.**—An instruction telling a jury that it is "the duty of a master to furnish his servant with tools and appliances that are reasonably safe," is erroneous, as the law is, that he is only required to use reasonable and ordinary care and diligence in providing suitable and safe machinery.

3. **APPELLATE COURT PRACTICE.—As to Refused Instructions, When Abstract is Incomplete.**—This court will not consider an assignment of error complaining of the refusal of the trial court to give certain instructions when the abstract does not contain all the instructions that were given so that the court can see whether similar instructions were given.

VOL. 69.] **Belleville Pump & Skein Works v. Bender.**

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

GEO. C. REBHAN and **HAMILL & BORDERS**, attorneys for appellant.

FRED. B. MERRILLS and **ROBERT A. MOONEYHAM**, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for damages, caused, as alleged, by the negligence of appellant in furnishing appellee, who was at the time an apprentice moulder, an unsafe and dangerous chiller in which to pour molten metal; and in failing to instruct and inform appellee, who was of the age of sixteen years, and alleged to be inexperienced, of the danger attending such work. The errors discussed relate to the refusal to admit certain evidence, the giving and refusing to give instructions, and to the verdict and judgment, which it is claimed, are not warranted by the evidence.

The facts in brief are, that appellee had been working for the company about twenty months prior to the accident, and for about six months prior thereto as an apprentice moulder. On the day of the accident, February 9, 1889, he was making what is called jack-nuts, being the top nuts in jack-screws, which is what is called bench work. He filled his ladle with molten iron out of the cupola and poured two or three molds, when, having a small quantity left, but not enough for another mold, he attempted to pour the residue into a small iron vessel, about eighteen inches long, six inches deep, eight inches wide at the top and four at the bottom, resting on the ground floor, called a chiller or ingot, used to save such residue, when, owing to that vessel being damp, or having a piece of rusty scrap iron in it, there was an explosion of the molten metal he had so

Belleville Pump & Skein Works v. Bender.

poured in, and a dash of it struck him in the eye, which so injured it as to cause him to lose the sight of that eye. He claims that he did not know of the danger, and that he had not been instructed. The record seems to be replete with proof that explosions, especially in cold weather, were very common, though no injuries had before occurred. That he knew of explosions, though none had occurred with him before, he admits. From the general tenor of the evidence, both on the part of the plaintiff and defendant, it appears that was a well known fact. He had been pouring molten metal into the chillers about twice in three days, on an average, for about six months, and knew, as he testified on a former trial, that molten metal poured into a damp pig-bed or chiller would explode, and that a chiller on damp ground would acquire moisture. On this trial he seems to think that he did not understand the questions in that way, and his counsel claims that he was speaking of knowledge acquired thereafter, as after recovery he continued to work for appellant for some time.

The appellant introduced three witnesses, who testified that appellee was warned to be careful at the time, about pouring molten metal in that chiller. This warning is denied by appellee and several witnesses. The superintendent testified that he gave him particular directions about the manner of pouring the metal into the chiller, which is denied by appellee. The witnesses on both sides testify that care must always be used to pour the metal in slowly, so that a small quantity covering the bottom of the chiller may absorb the dampness, before pouring in the entire quantity. This seems to be general knowledge in that business. At best the case is very close on the facts, and therefore the instructions should have been accurate. Volk v. Roche, 70 Ill. 297; C., B. & Q. R. R. Co. v. Van Patten, 64 Ill. 510; and especially so where the evidence is so evenly balanced that it would support a verdict for either party. Shaw v. People, 81 Ill. 150; Holloway v. Johnson, 129 Ill. 367. Inaccuracy on one side will not in such case be cured by accuracy on the other. I. C. R. R. Co. v. Maffit, 67 Ill. 431.

VOL. 69.] St. L., B. & S. Ry. Co. v. Gundlach.

The second instruction given for the plaintiff was erroneous. It told the jury that "it was the duty of the master to furnish his servant with tools and appliances that were reasonably safe." The law is that he is only required "to use reasonable and ordinary care and diligence in providing suitable and safe machinery." Camp Point Mfg. Co. v. Ballou, 71 Ill. 421. This is the rule well established in this State, and it is not necessary to burden this opinion with citations to verify it.

The appellant complains of the refusal of the court to give certain instructions offered in its behalf, but as the abstract does not contain all the instructions, as required by various decisions, in order that this court may see whether a similar instruction had been given, that assignment of error is not considered.

There was no error committed in refusing to admit evidence on behalf of defendant that explosions of the molten metal occurred under different conditions.

The judgment is reversed and the cause remanded.

St. Louis, B. & S. Ry. Co. v. Phillip M. Gundlach.

1. **CERTIORARI—Petition for writ of, and Accompanying Affidavit are Amendable.**—Under the statute a petition for a writ of certiorari and the affidavit thereto are amendable, and a refusal to allow an amendment to be made is ground for reversal of the judgment, if the proposed amendment would cure the defects and make the petition sufficient.

2. **APPEALS—Failure of Justice to Keep Promise to Give Notice of Rendition of Judgment Does not Excuse Failure to Take.**—The promise of a justice of the peace to inform the attorney for one of the parties when he would enter judgment is not a judicial act or arrangement, and can not be binding so as to effect the opposite party's rights or be set up as a cause for not taking an appeal in time.

3. **JUSTICES—Have no Power to Amend Their Records.**—A justice of the peace has no right to alter or amend his records after they have once been made.

Petition, for writ of certiorari. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

St. L., B. & S. Ry. Co. v. Gundlach.

G. A. KOERNER, attorney for appellant.

EDWARD L. THOMAS, attorney for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee brought suit in forcible detainer against appellant and others before a justice of the peace. A trial was had before the justice, without a jury, on the 15th day of October, 1895. After hearing the evidence and oral arguments, it was agreed the parties might file written briefs by the 19th day of October, to which day the case was continued. On this date appellant's counsel handed the justice his written brief, with a request that the justice would let him know when he would decide the case, with which request the justice promised to comply. The justice decided the case on the 19th day of October, and entered up judgment in favor of appellee, without notice to appellant's counsel, and of which fact he had no notice until October 25th, when calling upon said justice, he learned the fact, at which date the time for appeal had expired, to which fact the justice's attention was called by appellant's counsel, when the justice entered on his docket, just preceding the judgment, the following: "October 19th. Case taken under advisement until October 24, on which day judgment was entered," etc. On the 26th day of October appellant's counsel applied to the justice to fix the amount of the appeal bond, which the justice refused to do, having reconsidered his act of making the entry in his docket on the 25th continuing the cause, and afterward erasing such entry.

The appellant filed its petition for certiorari, setting up the foregoing facts as the reason for not taking the appeal within the five days, as required by law, and also setting out the fact that it had a good defense to said action, etc., and obtained the writ. The affidavit to the petition was sworn to by one Samuel Leathe, based on information and belief. In the Circuit Court a written motion was made

to quash the writ, on the ground: 1, that the petition did not show sufficient cause for issuing the writ; 2, that it did not show appellant was not guilty of negligence in taking the appeal; 3, that the oath to the petition was made on information and belief. As stated in the abstract, upon an intimation from the court that the affidavit was insufficient, the petitioner asked leave to amend by filing an affidavit that the facts stated in the petition were true, and that the rental value of the premises did not exceed \$200 per annum, which leave the court refused to grant, and quashed the writ; from which order this appeal was taken.

The appellant insists it had a right, under the statute, to make the amendment, and states that is the only point in the case appealed. If this was the only point, the case would be reversed and remanded, for the petitioner, under the statute, had the right to amend the petition or affidavit, if such amendment would cure defects, and make the petition sufficient. But it is clear that the petition, with the proposed amendments, would not have been sufficient, and doubtless it was because of this fact the court refused to allow the amendments and quashed the writ.

The justice entered final judgment on his docket on the 19th day of October, the day to which the case had been in open court continued. After that time he had no legal right or power to afterward open the judgment for the purpose of any change or modification. As is said on p. 639 of *Merritt v. Yates*, 71 Ill.: "We are aware of no statute or common law practice which authorizes, or in any manner sanctions, the right of justices of the peace to amend their records after they have once been made. To allow a justice to make alterations and changes in his record at will, and according to his whim, would be fraught with evil and wrong that would be oppressive. Such a power has not been intrusted to the higher courts, and cannot be exercised by these inferior jurisdictions."

The only remaining question necessary to be considered is, did appellant's counsel have the right to rely on the promise of the justice that he would let the former know when he entered judgment?

Kerns v. Green.

The petition in Clifford v. Waldrop, 23 Ill. 336, set up as a cause for not taking the appeal in time, that the justice promised to let petitioner know in time for him to take an appeal if judgment was entered against him, which the justice failed to do. In effect this was held not to negative negligence. Necessarily the private promise of the justice to inform appellant's counsel when he would enter judgment could not be binding so as to affect appellee's rights. It was not a judicial act or arrangement. This being true, there was no fact set up in the petition negating negligence in taking the appeal, as required by law, and therefore the writ was properly quashed, and the judgment is affirmed.

Charles Kerns et al. v. William M. Green.

1. **JUDGMENT—*Must be Sustained by the Evidence.***—The court holds that the evidence in the record does not sustain the judgment, and that it must be reversed.

Transcript, from a justice of the peace. Appeal from the County Court of Wayne County; the Hon. Wm. T. Bonham, Judge, presiding. Heard in this court at the August term, 1896. Reversed. Opinion filed March 3, 1897.

CREIGHTON & KRAMER, attorneys for appellants.

No appearance for appellee.

PER CURIAM.

No brief was filed by appellee, and therefore, under rule 31, we might reverse the case *pro forma*, but we have examined the record and hold that the evidence does not sustain the judgment.

Judgment is reversed and not remanded.

Henry Sudbrack v. Samuel W. Green, Joseph Green and Richard Green, Partners, etc.

1. **JUDGMENT--*Sustained by the Evidence.***—The court holds that the evidence in this case sustains the findings of the trial court and that the judgment must be sustained.

Transcript, from a justice of the Peace.—Appeal from the Circuit Court of Massac County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

HARVEY A. EVANS and COURTNEY & HELM, attorneys for appellant.

GEORGE SAWYER, attorney for appellees.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.
This suit was brought in justice's court, and tried on appeal in the Circuit Court by the judge, by agreement of the parties. Finding was for appellees, and judgment for \$36 damages and costs of suit was entered for them and against appellant. The damages were claimed by reason of the destruction of thirty-six cords of wood by fire, which fire was started by appellant in his field adjoining the wood, and spread to the wood and burned it up. No question of law was presented to the trial court to be held, nor is any ruling of the court during the trial objected to except upon the admission or refusal to admit evidence, and we find no error in that regard. The evidence sufficiently established the negligence of appellant as claimed, and the destruction of the wood of appellees by reason of such negligence, and its value when burned.

The judgment is affirmed.

City of Alton v. English.

City of Alton v. David English.

1. **NEGLIGENCE—Showing Necessary in Actions Based on.**—In actions based on mere negligence the plaintiff must show not only the negligence of the defendant, but also the exercise of due care on his own part.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1896. Reversed. Opinion filed March 3, 1897.

HENRY S. BAKER, JR., attorney for appellant.

R. J. BROWN and C. N. TRAVOUS, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The declaration alleges the street over which appellee passed with his horse and buggy was in a bad condition, whereby he was injured, for which he recovered damages. The appellant claims the evidence does not warrant the judgment, and also assigns other errors.

The facts in brief are, that appellee, with his horse and buggy, passed over a plank culvert, covering a gutter, the planks of which culvert were loose and somewhat frightened the horse, but no accident then occurred. Within a short time he returned over same street, and, as he testified in chief, “When I came back I examined the culvert and tried to get my horse over the bridge again, but he would not pass over it. I had to drive to one side, where I saw there were wagon tracks, where they had been crossing through, and I suppose one of the wheels caught on the corner of these planks and threw the buggy up, and dumped me out on the right hand side.” The gutter which appellee had to pass over was about sixteen inches deep in the center, and was not difficult to cross. The undisputed fact is that the accident was occasioned by appellee driving so close to the

VOL. 69.]City of Alton v. English.

culvert, in passing to the west of it over the gutter, that one of the wheels of his buggy caught on the planks. There was plenty of room for him to have passed entirely west of the culvert, and had he done so, concededly, the accident would not have happened. The evidence does not show, when considered in its entirety, that "the horse being frightened sprang to the west of the bridge and attempted to cross the ditch," as stated by appellee's counsel.

The appellee claims that if the culvert had not been out of repair the accident would not have happened, and therefore insists the injury was the combined result of an accident and defect, and cites Palmer v. Andover, 2 Cush. 608, and other cases laying down the general doctrine. Our court has laid down the same rule in City of Joliet v. Verley, 35 Ill. 58, citing the Palmer case. The general rule suggested is well settled law, but the law is not applicable to the facts. As is said in the Palmer case, *supra*, "this doctrine in no respect conflicts with the well-settled rule requiring the plaintiff to use ordinary care and diligence, and that without showing this he can not recover, though the road be defective, and the damage be occasioned by the combined effect of a defective road and want of care and skill in avoiding the injury." In all the cases on the subject of the general rule relating to an injury being the result of accident and defect, it is further held that there must be no fault or negligence on the part of the plaintiff. The rule is without exception that in actions based on mere negligence the burden is on the plaintiff, not only to show negligence of the defendant but also the exercise of due care on his own part. Aurora B. R. R. Co. v. Grimes, 13 Ill. 585; Kepperly v. Ramsden, 83 Ill. 354. The evidence does not show due care on the part of appellee. He did not pass over the defective bridge, but around it, and in doing so neglected to drive far enough west to pass or miss the culvert. The defective culvert was not the proximate cause of the injury, any more than if in attempting to turn around at the culvert to take another street, he had carelessly upset his buggy and received the injury. In such case it could not be said

Emig v. Medley.

the defective culvert and such an accident combined produced the injury and created a liability, for the reason it was produced by a failure to exercise due care and skill.

The evidence did not authorize the judgment entered, and therefore the judgment is reversed without remanding.

Adam Emig v. E. A. Medley.

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1. **PRACTICE—Time of Filing Declaration.**—The provision of the practice act which requires a declaration to be filed ten days before the second term of the court, only requires the filing of the declaration before the second term at which the plaintiff may be required to plead.

2. **JUDGMENTS—Findings of Amounts due, do Not Amount to.**—The following entry does not amount to a judgment: “The court finds there is due the plaintiff the sum of \$400; it is therefore ordered that said E. A. Medley, plaintiff, have and recover judgment against the said Adam Emig, defendant, for the amount of said judgment, together with the costs of this proceeding, and that execution issue therefor.”

Covenant.—Error to the County Court of Clay County; the Hon. BENJAMIN HAGLE, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

VAN HOOREBEKE, FORD & LOUDEN, attorneys for plaintiff in error.

HOFF & HOFF, attorneys for defendant in error.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was commenced on November 27, 1893, and summons issued against Adam Emig, defendant, returnable to the January term, 1894, which summons was not served. At said January term cause was continued, no declaration having been filed, and was continued at the June term, 1894, for the same reason. On September 18, 1894, an alias summons was issued against defendant, returnable to the January term, 1895, which was duly served September 19, 1894, commanding defendant to appear and answer in assumpsit.

At that term the cause was continued to the June term, 1895, for want of declaration. On May 27, 1895, a declaration in assumpsit was filed, and on the second day of said June term, 1895, judgment by default for \$400 was entered against said defendant in the suit in assumpsit. On June 25, 1895, a motion supported by affidavits was filed on behalf of the defendant to set aside said default and judgment, which motion was sustained and the default and judgment set aside. Thereupon the plaintiff was on motion granted leave by the court, upon payment of all costs, to change the action from assumpsit to covenant, with leave to amend declaration, and cause was continued to January term, 1896. On December 20, 1895, plaintiff filed amended declaration in covenant, and on the first day of said January term, the following entry is set forth in the transcript of the record : " And he being three times solemnly called in open court, and comes not, but makes default, and this case coming on to be heard by the court, the court being fully advised in the premises, finds there is due said plaintiff the sum of four hundred (400) dollars. It is therefore ordered that said E. A. Medley, plaintiff, have and recover judgment against the said Adam Emig, defendant, for the amount of said judgment, together with the costs of this proceeding, and that execution issue therefor."

But two errors assigned are necessary to be passed upon and decided. These are the first and fifth.

The first avers: "The court erred in not dismissing the case because more than two terms of court had passed after the commencement of the suit and before the filing of the declaration." This error is assigned because the 17th section, par. 18, of the Practice Act, provides, among other things, "If no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a nonsuit;" and this provision is alleged to have been violated, and hence the suit ought to have been dismissed.

But it appears, although the suit was commenced November 27, 1893, no summons was served upon defendant Emig

Emig v. Medley.

until September 19, 1894, returnable to the January term, 1895, and on May 27, 1895, which was ten days before the second term after service of process on said defendant, a declaration was filed. This declaration was filed in apt time to prevent the dismissal of the suit for the reason assigned, under the construction given to said section of the practice act by our Supreme Court in Waidner v. Pauley, 141 Ill. 444. In that case suit was brought December 17, 1886, and no service of summons was had until December 8, 1887. On December 21, 1887, a declaration was filed, and on the next day defendant Waidner moved to dismiss the suit because the declaration had not been filed ten days before the second term of the court. The motion was overruled and defendant assigned this ruling for error. The Supreme Court say in the opinion, after reciting the section of the practice act above mentioned: “We decided in Herring v. Quinby et al., 31 Ill. p. 153, that the term of court contemplated by the statute is that at which the defendant is served. Before the defendant is brought into court he can not be required to plead, and no useful purpose could be served by apprising the defendant of the plaintiff’s ground of action when he could not be required to plead. The rights of the parties should be reciprocal. As a general rule of practice, a party in court can not force his adversary to act until he is himself in a condition to be forced to proceed.” And it is finally said in the opinion, “we think the correct construction was given in Herring v. Quinby, and the judgment is affirmed.”

The first error is not well assigned.

The fifth error is, that it does not appear that any judgment was rendered by the court, and no amount is specified for which judgment is rendered. We think this error is well assigned. A finding was held by the court, but no judgment was rendered for the amount found to be due, nor does it appear that the court entered any judgment. The case of Faulk v. Kellums, 54 Ill. p. 190, was one where a jury assessed plaintiff’s damages at \$4,493, followed by the entry “whereupon the court entered judgment upon the verdict.”

VOL. 69.]Bauchens v. Paulis.

Motions for a new trial and in arrest of judgment were severally denied, and defendant appealed. The Supreme Court, in the opinion, say: "There is also an objection to the form of the judgment, if judgment it can be called, which is well taken. The *ideo consideratum est* is wanting. It has no element of a judgment other than a bare recognition of the finding of a jury." So in the case at bar there is the same infirmity. The finding by the court is like the verdict of a jury, and a judgment for a certain amount must be entered by the court. See also Carpenter v. Sherfy, 71 Ill. 427; Nichols v. Stewart, 21 Ill. 106.

The judgment is reversed and cause is remanded.

Adam Bauchens and Louis Bauchens v. Elizabeth Paulis.

1. **VERDICTS—Sustained by the Evidence.**—In this case the court holds that the evidence was amply sufficient to sustain a judgment against the defendants.

Trespass, for an assault and battery. Appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

L. H. HITE, attorney for appellants.

ENLOE & NEUSTADT, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellants were sued by appellee in trespass to recover from them damages for injuries to her person by them inflicted. The trial was had, the jury assessed plaintiff's damages at \$500; defendants' motions for a new trial and in arrest of judgment were each overruled and judgment was entered against the defendants, as appears by the verdict and the record as corrected and now filed in this cause.

Wells v. Tedrick.

Hence there is no ground for sustaining the objection of appellants that the judgment is against the defendant and not against the defendants.

The appellants also contend the evidence does not sustain the verdict. In this view we do not concur. The evidence on behalf of the plaintiff was amply sufficient, if the jury believed the witnesses, to convict both defendants of an atrocious assault and battery causing serious bodily harm to plaintiff.

No good reason for reversing the judgment appears, and it is therefore affirmed.

M. D. Wells et al. v. J. E. Tedrick, for use, etc.

1. ASSESSMENT OF DAMAGES—*Must be Made on Evidence.*—The unsworn statement of an attorney or the belief or supposition of a judge are not a sufficient basis for an assessment of damages.

2. BILLS OF EXCEPTIONS—*Copying Papers and Records not in Evidence.*—The fact that certain papers and a record are copied into a bill of exceptions is immaterial if the trial judge does not certify that they were in evidence or even before the court, but only that he supposed or believed that the attorney had the papers in his hands and that the record was present when the damages were assessed.

3. PRACTICE—*On the Reversal of a Judgment on Demurrers.*—A judgment was entered overruling a demurrer to pleas to the first count of a declaration and sustaining a demurrer to the second count. On appeal this judgment was reversed. *Held*, that the order of reversal expunged this judgment from the record and that it was not necessary for the trial court to set it aside, but that the pleas and demurrers remained on file and must be disposed of before a default could be entered.

Debt, on a replevin bond. Appeal from the Circuit Court of Effingham County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded with directions. Opinion filed March 8, 1897.

ASHCRAFT, GORDON & COX and JOHN A. BINGHAM, attorneys for appellants.

WRIGHT BROTHERS and E. N. RINEHART, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee sued appellants in an action of debt on a certain replevin bond, and the court rendered a judgment by default in favor of appellee for \$1,500 debt and \$874.10 damages and for costs, the judgment to be discharged upon the payment of the damages and costs.

The declaration contained two counts. Appellants filed a large number of pleas to the first count, and demurred to the second. The court sustained a demurrer to all of the pleas which were not withdrawn, except the fourth and fifth, as to which the demurrer was overruled, and sustained the demurrer as to the second count of the declaration. Appellee elected to stand by his demurrer to the fourth and fifth pleas, and by the second count of the declaration, and the court rendered judgment against appellee for costs.

Appellee thereupon brought the record to this court by appeal, and the judgment was reversed and the cause remanded on the ground that the court erred in overruling the demurrer to the fourth and fifth pleas and in sustaining the demurrer to the second count of the declaration. 59 Ill. App. 657. The judgment of reversal, which is in evidence in the present record, is that the "judgment of the Circuit Court in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed." The remanding order is that "this cause be remanded for such other and further proceedings as to law and justice shall appertain."

The case was duly reinstated on the docket at the October term of the Circuit Court, 1895. On the first day of the March term thereafter, the court permitted appellants to be defaulted, without any further order as to the pleadings, and assessed appellee's damages and rendered judgment against appellants as hereinbefore stated.

We deem it proper to consider, first, whether or not the assessment of damages can be sustained under this record.

It is provided by Sec. 40 of the Practice Act that "in all suits in the courts of record in this State, upon default, when the damages are to be assessed, it shall be lawful for the court to hear the evidence and assess the damages without a jury for that purpose."

Wells v. Tedrick.

Upon default, the defendant may appear and defend as to the question of damages, and he may even demand a jury, in which case the refusal of the court to accede to his request would be error. *Pinkel v. Domestic Sewing Machine Co.*, 89 Ill. 277.

The record shows that appellee claimed as damages the value of certain goods taken under the replevin writ and not returned; that counsel for appellee, without being sworn, stated the amount of the damages, and that the court acted upon this statement; that the attorney held in his hands at the time certain papers, and pointed at a certain book, and that the court supposed that these were the papers and record in the replevin suit; and there was no formal offer of the papers or record as evidence, and that the same were not read by or to the court.

Appellants afterward made a motion to set aside the assessment of damages and for leave to plead, which motion was overruled. An exception to this ruling was duly preserved.

The bill of exceptions states that the foregoing was all that occurred in the Circuit Court in anywise appertaining to the assessment of damages.

And so the record clearly shows that the damages were assessed by the attorney and not by the court. The court did not hear evidence. The unsworn statement of an attorney, or the belief or supposition of the judge, can not be regarded as a sufficient basis for the assessment of damages.

The fact that the papers and record in the replevin suit are copied into the bill of exceptions is immaterial, for the trial judge does not certify that these papers and this record were ever in evidence, or even before the court, but only that he supposed or believed that the attorney had the papers in his hands and that the record was present when the damages were computed.

There is another reason why the judgment in this case should be reversed. The court should not have permitted appellants to be defaulted without sustaining the demurrer to the fourth and fifth pleas and overruling the demurrer to the second count of the declaration.

When this case was before us on the pleadings, the judgment of this court merely annulled and set aside the judgment of the Circuit Court. The pleas and demurrers were not stricken from the files. They yet stood in the way of a default. This court did not assume to discharge the functions of the Circuit Court, but merely to tell the Circuit Court what to do. It remained for the Circuit Court to act in accordance with the opinion of this court, that is to say, to sustain the demurrer to the pleas and to overrule the demurrer to the second count, before proceeding to render judgment against appellants by default or otherwise. See Maggott v. Roberts, 112 N. C. 71, in which case the court uses the following language: "When this case was here on a former appeal, the court held that the court below should have sustained the demurrer to the third cause of action for failure to allege that the license to a person under eighteen years of age was issued 'knowingly and without reasonable inquiry.' When the case subsequently came up for trial below, the court excluded any evidence upon that cause of action upon the ground that it was *res judicata*.

"This was error. The court below, in accordance with the opinion here, should have reversed the former action of that court and have entered judgment sustaining the demurrer, and thereupon the plaintiff might have been permitted to amend by inserting those words."

And again, the court says: "There was no adjudication here beyond the ruling that there was error in not having sustained the demurrer below."

The cases cited in appellee's brief do not hold the contrary, as is supposed. These cases are Chickering v. Failes, 29 Ill. 294; Cable v. Ellis, 120 Id. 136; Palmer v. Woods, 149 Id. 146. The statements relied upon are found in the opinion in the first case, and are quoted in the opinions in the other two cases, and announce the doctrine that when a judgment or decree is reversed, the judgment or decree is entirely abrogated, "expunged from the record," and that the case stands in the trial court thereafter in the same condition as if no judgment or decree had ever been rendered.

The People v. Kirkpatrick.

The judgment of the Circuit Court in the case at bar was that the demurrer to the fourth and fifth pleas be overruled and the demurrer to the second count sustained. The order of reversal expunged this judgment from the record, and it was not necessary for the trial court to set aside this abrogated judgment. But the pleas and demurrer remained on file. The trial court was advised what to do with them and should have done that thing in order to rid the record of every barrier to the proper progress of the cause.

The judgment of the Circuit Court is reversed, and the cause is remanded, with directions to that court to sustain the demurrer to the fourth and fifth pleas and to overrule the demurrer to the second count of the declaration, and to proceed otherwise in accordance with the views herein expressed.

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73	214
69	207
85	454

The People, etc., for use, etc., v. W. S. Kirkpatrick et al.

1. **CONDITIONAL SALES—Justice not Liable for Failure to Docket Acknowledgment of.**—An instrument whereby title is to pass to a purchaser on condition of his paying for the property, although it be actually delivered to the purchaser, is a conditional sale and not a chattel mortgage, and a justice of the peace acknowledging such an instrument is not liable for a failure to enter a memorandum thereof on his docket, there being no request for him to do so.

Debt, on an official bond. Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

H. CLAY and BENJAMIN W. POPE, attorneys for appellants.

F. M. YOUNGBLOOD and H. B. REED, attorneys for appellees.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought in the name of the people, by James

W. Tuffts, on the official bond of W. S. Kirkpatrick, as a justice of the peace, for an alleged failure on his part, as such justice, to enter on his docket, as required by the chattel mortgage law, the following instrument, whereby, it is alleged, said Tuffts lost the property therein described:

"Wykes & Co. to James W. Tuffts: Know all men by these presents, that Wykes & Co., of Tamaroa, in the State of Illinois, are justly and truly indebted unto James W. Tuffts, of the city of Boston, in the Commonwealth of Massachusetts, in the sum of four hundred thirty (430) dollars, as evidenced by twenty-five promissory notes, bearing date the twenty-eighth day of May A. D. 1894, maturing in amounts and times as follows:

"Twenty dollars per month from June 28, 1894, to Sept. 28, 1894, incl. Fifteen dollars per month from Oct. 28, 1894, to March 28, 1895, incl. Twenty dollars per month from April 28, 1895, to Sept. 28, 1895, incl. Fifteen dollars per month from Oct. 28, 1895, to May 28, 1896, incl. Twenty dollars June 28, 1896; with interest at six per cent from date; which said notes were given by us for certain soda water apparatus, conditionally purchased of the said James W. Tuffts, and now at our place of business in Tamaroa, and which is more particularly described as

"One 10 I. W. R. fancy Siberian Wachusett, No. 829; two 10-gal. steel founts; the condition of said purchase being that the title to the above mentioned property should not pass to us, but that until all said notes are paid the title to the aforesaid property should remain in the said James W. Tuffts, and we hereby authorize the said James W. Tuffts to appoint an agent for us for the renewal of record of this contract, if renewal should be required by law.

Witness our hand and seal this the eighteenth day of June, A. D. 1894.

WYKES & CO., [Seal.]
By GEORGE WYKES.

"STATE OF ILLINOIS, }
Perry Co. }

I. W. S. Kirkpatrick, a justice of the peace in the town of Tamaroa, in and for said county, do hereby certify

The People v. Kirkpatrick.

that this mortgage was duly acknowledged before me by the above named Wykes & Co., the mortgagors therein named, and entered by me this 18th day of June, A. D. 1894.

W. S. KIRKPATRICK, [Seal.]
Justice of the Peace."

The notes given also contained this provision :

"Nevertheless, it is understood and agreed by and between us and the said James W. Tuffts, that the title to the above mentioned property does not pass to us, and that until all said notes are paid the title to the aforesaid property shall remain in the said James W. Tuffts, who shall have the right, in case of non-payment at maturity of either of said notes, without process of law, to enter and retake, and may enter and retake, immediate possession of the said property, wherever it may be, and remove the same.

WYKES & CO."

The justice testified he did nothing with the instrument except to sign his name; that George Wykes, a party to the instrument, brought it to him; "he was in right smart of a hurry" and said, "I have an instrument here I want you to acknowledge. I didn't pay but little attention to it. I couldn't say what I was acknowledging for him. He said, "I will be in with it again soon." He took it away with him and did not bring it back. The evidence showed the property was levied upon by a constable on an execution against Wykes & Co. and sold. At the time of the levy the property was in the possession of an agent of Tuffts, the same having been surrendered by Wykes & Co. and delivered, but the execution was a lien before said delivery.

The court took the case from the jury by an instruction to find for the defendant, on the ground that the instrument was not a chattel mortgage, as claimed by appellant, and therefore the appellee, as justice of the peace, was not required to enter it on his docket. The correctness of that holding is challenged by this appeal.

The instrument recites an indebtedness of Wykes & Co. to James W. Tuffts of \$430, as evidenced by twenty-five promissory notes, describing them, "given for certain

soda water apparatus, *conditionally purchased* of said James W. Tuffts, and now at our (Wykes & Co.) place of business in Tamaroa, * * * the condition of said purchase being that the *title* to the above mentioned property should not pass to us, but until all said notes are paid, the *title* to the aforesaid property should remain in the said James W. Tuffts." This instrument must be construed as to its legal effect between the parties, so far as this suit is concerned, without reference to its effect as to third persons.

The appellant contends it was a mortgage, while the appellee insists, 1, that he did all he was requested to do by the party who brought the instrument to him, and in this he is sustained by the evidence; 2, that the property had been surrendered and delivered to Tuffts' agent before the levy, in time to have shipped it away; 3, as understood, he claims that, as between the parties, the title did not pass, and therefore the instrument is not a chattel mortgage; 4, that it does not provide Wykes & Co., the alleged mortgagors, should for any definite time have or retain the possession of the property, as provided by the statute. As between the parties, the title did not pass from Tuffts to Wykes & Co., as it is so expressly provided by the instrument itself. Such a contract, as between the parties, is legal and enforceable. Benjamin on Sales, 3d Ed., Sec. 320, and note d. On page 291, under said note, the Illinois cases are cited. The leading case is that of Brundage v. Camp, 21 Ill. 330, which holds, citing with approval Furness v. Howe, 8 Wend. 256, that, as between the parties, the title does not pass, but where there has been delivery of possession, as to third persons, the title reserved is not protected. Such a contract is held to be a conditional sale, as between the parties, in Murch v. Wright, 46 Ill. 487. A vendor, under such a contract, may, for condition broken, replevy the property without tendering the money paid. Fairbanks v. Malloy, 16 Ill. App. 277. By taking possession before the intervening rights of third persons attach, the vendor "becomes possessed not only of the property, but the title." Lucas v. Campbell, 88 Ill. 450.

The People v. Kirkpatrick.

Now let us consider what are the essential elements of a mortgage. A mortgage is a *conditional sale* of chattels, and operates to *transfer the legal title* to the *mortgagee*, to be defeated only by a full performance of the condition. Jones on Chattel Mortgages, Sec. 1, p. 1. "A decisive test of a legal mortgage of personal property is the use of language which makes the instrument one of sale, conveying the *title* of the property of the *creditor* conditionally." Ibid, Sec. 8. "An instrument whereby title is to pass to a purchaser on condition of his paying for the property, although it be actually delivered to the purchaser, is a conditional sale, and not a mortgage," citing authority. Ibid, Sec. 9. "Thus, upon the sale and delivery of the property, the vendee gave to the vendor a writing acknowledging he had received the property in trust, the ownership being exclusively vested in the vendor, and stating that upon the payment of a certain sum, the ownership should then vest in the vendee. The language used was regarded as plainly indicating an intent that the sale and delivery should not divest the vendor's title until the vendee should perform the condition subsequent; and therefore the transaction was a conditional sale;" citing Plummer v. Shirley, 16 Ind. 380, which holds the instrument was not a mortgage.

It would be doing violence to the language used in this instrument repeatedly affirming that the title did not pass to the vendee, but remained in vendor, to hold that it did pass, and that *by the instrument the title was retransferred* from the vendee, Wykes & Co., to Tuffts. In Fleury & Co. v. Tuffts, 25 Ill. App. 101, the same defendant, as it is assumed, where same kind of property was sold, and note given, with reservation of title in vendor, it was held to be a *conditional sale*. That is understood to be the established doctrine of this State as to such instruments; and herein the courts of this State differ with the courts of Colorado, which hold such a contract does not create a conditional sale. It necessarily follows, from the authorities cited, that the instrument is not a mortgage, for the reason that no title was transferred from Wykes & Co. to Tuffts, the cred-

itor, which is, as held by the authorities, the decisive test of the character of such an instrument.

It is not necessary to dwell on the other points made by appellee. Suffice it to say, the appellee was not required by law to enter the instrument on his docket as a chattel mortgage, and, in the absence of a request, in no event could he be expected to know the parties so desired it to be entered. If the law did require him to enter it, then the fact that appellant did not have it shipped away before levy would not exonerate him, under the facts in this case, showing the execution was a lien before he received it.

The judgment is affirmed.

Star Elevator Co. v. Albert Carlson.

69 — 212
105 1601 | 1. **MASTER AND SERVANT—Voluntary Choice of Dangerous Mode of Doing Work.**—When a servant voluntarily chooses a dangerous mode of performing his work, when a safe mode is open to him, and is injured thereby, he can not recover.

2. **SAME—Limitations on the Duty of Master to Keep Machinery in Repair.**—When a master has furnished machinery that is suitable for the business, both as to material and construction, to a servant experienced in the use of the machinery, he has performed his duty, and before he can be made liable for injuries received by the servant, notice must be brought home to him that it is out of repair.

Trespass on the Case, for personal injuries. Error to the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

ENLOE & NEUSTADT, attorneys for plaintiff in error.

COCKRELL & COOK, attorneys for defendant in error.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought by defendant in error to recover damages for a personal injury, alleged to be caused by the

Star Elevator Co. v. Carlson.

negligence of plaintiff in error in two particulars: 1. That a sprocket wheel was allowed to become loose and out of repair, so that it slipped on the conveyer shaft. 2. That the building was so improperly constructed, without sufficient windows in the basement, where said sprocket wheel and grain conveyers were situated, that sufficient light was not afforded to enable the one operating the machinery to handle it with safety. The defendant in error recovered a judgment, from which this writ of error is prosecuted.

The evidence shows the defendant in error was an experienced man in handling such machinery, and had charge of the operation of this elevator for about two years prior to the time of his last employment, which was three weeks before the accident.

On the day of the accident he was directed to start the machinery for the purpose of elevating grain into the bins, and did so. In a short time he discovered that the grain conveyer, situated in the basement, was not turning, and he went there to see what was the trouble. He put his hand on, or into, the conveyer in such a manner, and, as it happened, just at the time when the conveyer made a partial revolution, so that the third finger of his right hand was caught by the flange on the conveyer and crushed so that it had to be amputated.

The evidence shows the machinery was in a reasonably safe condition, but that dust and chaff had settled and accumulated in the conveyer so as to choke it. When that was removed, the machinery operated properly. The evidence also shows that the sprocket wheel was not loose and did not slip on the shaft, but that the bevel cog wheel on the center shaft, working on the bevel cog wheel of the main shaft, was slipping cogs, caused by the choking of the conveyer on main shaft. It is evident that the main conveyer would not have made a partial revolution if the sprocket wheel or bevel cog wheels had been loose and slipping on their shafts. The evidence that an examination showed they were tight is not disputed. Therefore, clearly, the only trouble was the accumulation of dirt in the con-

veyer, which was not a defect in the machinery, but rather a neglect in its care. The machinery was in the care of defendant in error to see that it was properly oiled, cleaned and, in such respects, in proper condition for operation.

The evidence does not show improper construction of the basement with reference to the light, considering its situation. Besides, the defendant in error knew a lantern was kept at the elevator for the purpose of use in the basement. "Q. Did you ever use it in the basement? A. Yes, sir. Q. They had a lantern there to use, didn't they; they had a lantern there for you to use? A. Yes; sir; * * * I never took it down; it was against the rules of the insurance company." There is no evidence any one prohibited him from using it in the basement, but there is evidence to show it was so used. There were two windows in the basement which afforded some light. It is well known that basements are not, and very often can not be, as well lighted as upper rooms in a building. Plaintiff in error was well acquainted with the situation, and if he did not want to take a lantern he could readily have stopped the machinery, which was in his exclusive charge. With the power on, he should not have put his hand on, or in, or about the conveyer, so that it could be caught. No one knew so well as he that the conveyer was liable to revolve. He evidently was working to get the dirt and dust out while the power was on. "Q. Do you know what condition the grain conveyer was in—what did you find there? A. I found a whole lot of dust and dirt. Q. That was in the box where this auger (conveyer) worked? A. Yes, sir." Necessarily, he must have placed his hand so that a flange of the conveyer caught his finger. It is idle to say he did not, for, concededly, the flange struck it. He did this when he knew, being in entire charge of the machinery, having just started it, that the power was on and the conveyer was liable to move, which it did, and injured him. By stopping the machinery, he could have investigated the difficulty and removed the accumulated dirt with perfect safety. Where a servant chooses, voluntarily, a dangerous mode of performing the

Hobson v. Tritt.

work, when a sure mode is open to him, and is injured thereby, the law is well settled that he can not recover. C. & T. R. R. Co. v. Simmons, 11 Ill. App. 147–151; and see large number of cases there cited. St. L. Bolt & Iron Co. v. Brennan, 20 Ill. App. 555.

The servant must exercise judgment and care in such matters. Whittaker v. Coombs, 14 Ill. App. 498; Penn Co. v. Lynch, 90 Ill. 333. As to one experienced in the use of machinery, when the master has furnished machinery that is suitable for the business, both as to materials and construction, he has performed his duty, and before he can be made liable, notice must be brought home to him that it is out of repair. Richardson v. Cooper, 88 Ill. 270; C. & A. R. R. Co. v. Bragonier, 119 Ill. 51.

From no point of view does this record disclose a liability, and therefore the judgment is reversed without remanding..

John Hobson v. James M. Tritt et al.

1. **NON-RESIDENCE—Right to Plead, Not Waived by Plea Denying Liability.**—Non-residents of a county were sued jointly with a resident and filed pleas denying liability, the suit was dismissed as to the resident defendant when the non-residents, by leave of court, withdrew their former pleas and filed a plea to the jurisdiction on the ground of their non-residence: *Held*, that by the action of the plaintiff in dismissing as to the resident defendant the case was taken out of the operation of the proviso in the statute and brought within the prohibition, and that the plea set up a good defense.

Trover, alleging the conversion of four mules and other property. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 8, 1897.

JOHN G. IRWIN and E. BREESE GLASS, attorneys for appellant.

W.M. WINKELMANN and JESSE M. FREELS, attorneys for appellees.

VOL. 69.]Hobson v. Tritt.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit involves a construction of Section 2 of the Practice Act, which provides: "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that in every species of personal actions in law where there is more than one defendant, the plaintiff commencing his action where either of them resides, may have this writ or writs issued, directed to any county or counties where the other defendant or either of them may be found; provided, that if a verdict shall not be found or judgment rendered against the defendant or defendants resident in the county where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action."

The contention is principally in regard to the proper construction of the proviso, which for better analysis may be divided into three parts: 1, that a verdict or judgment must be entered against the resident defendant; or, 2, if not, judgment "shall not be rendered against those defendants" who are non-residents; 3, unless they appear and defend the action. The idea of unity and finality is implied in the judgment to be rendered, both as to the resident and non-resident defendants; that is, a judgment that disposes of the entire case as to both classes of defendants, at the same time.

In other words, the proviso contemplates that the resident defendant will be a party when such judgment disposing of the entire case is entered. Otherwise, how could it be determined, as provided by that proviso, that judgment should or should not be rendered against such resident defendant. Upon that determination, either for or against the resident defendant, depends, under that proviso, the right to enter judgment against the non-resident defendants, though they have plead to the action.

In other words, the verdict (meaning a final hearing) or judgment (likewise in same connection meaning final hear-

Hobson v. Tritt.

ing) for or against the *resident* defendant is a prerequisite to the right, at the same time, to render judgment against the non-resident defendants, though having appeared and plead.

That proviso does not contemplate that a verdict may be found or a judgment rendered for or against the resident defendant at one time, and then, that a verdict may be found or judgment rendered against the non-resident defendants at another time, if they have plead to the action. But that, if the non-resident defendants have plead, and at final hearing, disposing of the entire case, judgment is not rendered against the resident defendant, judgment may be rendered against the non-resident defendants. The judgment referred to by this proviso relates to the final judgment on hearing, as to the resident defendant, just as clearly as it does to the non-resident defendants. The idea of separate judgments at different times, by dismissal as to resident defendant and then thereafter a trial and judgment against the non-resident defendants, if they have plead before dismissal, is not implied. Unity of time, and of both classes of defendants in the same suit when the judgment is rendered, is implied, notwithstanding the plea. To hold that the words, “unless they appear and defend the action,” permits the plaintiff to dismiss the suit as to resident defendant, as soon as non-resident defendants file their plea, and then proceed to trial against them, would be a perversion of the statute and defeat its salutary purpose.

It would deprive them of substantial rights, viz., the statutory right to be sued in the county of their residence, and the constitutional right to defend wherever lawfully sued without by such defense waiving against their will the statutory right as to the county of suit. A defendant should not be deprived of such a statutory and substantial right against his will, merely by the exercise of his constitutional right of filing his plea in defense of the action, which was all he could do, if he wanted to defend, while the resident defendant was a party to the suit. By such a practice he might be called hundreds of miles distant from

his county to defend a suit, only to find, after filing his plea in defense of the action, in the exercise of his constitutional right, that he had been trapped. A construction should not be given to this statute that would enable plaintiffs to indulge in such a practice and thereby defeat its plain purpose. The plaintiff in such a suit takes the chances of obtaining judgment against the resident defendant, if the non-residents do not appear and defend the action; and likewise takes the chances of being able to maintain his suit on the hearing of his evidence until determined by final verdict or judgment that the resident defendant is or is not liable, before he can obtain judgment against the non-resident defendants, though they appear and plead to the action.

The Supreme Court has uniformly held, and with emphasis, that the right of a person to be sued in the county of his residence is not only a statutory but a substantial right, *Humphrey v. Phillips*, 57 Ill. 132; *Drake v. Drake*, 83 Ill. 526; *Safford v. Sangamon Ins. Co.*, 88 Ill. 296; and that a plea to the jurisdiction of the court, in such case, is a meritorious plea, amendable in form or substance. *Drake case, supra*; *M. P. Ry. Co. v. McDermid*, 91 Ill. 170.

In the case in hand, as soon as plaintiff dismissed the suit as to the resident defendant, then for the first time the suit came within the plain prohibition of the statute and the non-resident defendants withdrew, by leave of court, their former pleas and filed a plea to the jurisdiction on the ground of their non-residence, to which the court sustained a demur-rer because they had previously filed their pleas, which ruling was error. By the action of the plaintiff, the cause was taken out of the operation of the proviso and brought within the prohibition.

The plea setting up the statutory right was filed at the *first* opportunity, and should have been sustained. Some technical objections are made to this plea as not being good under the technical rules applicable to the common law plea of abatement, but, as has been held, 91 Ill. 170, *supra*, these rules do not apply.

It is urged the defendant might have filed this plea at an

Buck v. Mitchell.

earlier date. This is a mistake. The statutory conditions, making it unlawful for the plaintiff to sue the defendant out of the county of his residence, or where he might be found, did not exist until the plaintiff dismissed the suit as to the resident defendant. It is not necessary for the court to decide whether the first special plea set up a good defense in law or not. That question is not before us, as the plea was withdrawn by leave of court, when the suit was dismissed as to the resident defendant.

The judgment is reversed and the cause remanded.

Mastin E. Buck, Sheriff, etc., v. Thomas J. Mitchell.

1. HOMESTEADS—*Errors in Judgment by Commissioners to Assign—Evidence of Undervaluation to Show Fraud in Assigning.*—The mere fact that commissioners appointed by a sheriff to set off a homestead may have erred in their judgment as to the value of the property, would not justify a court of chancery in setting aside their proceedings. It is proper, however, upon the question of fraud to show that the property was greatly overvalued by the commissioners.

2. SAME—*Commissioners to Assign Should be Fairly Chosen—When Fraud in Appointment of may be Inferred.*—The law contemplates the selection of fair-minded, disinterested and competent men to act as commissioners to set off homesteads, and if a sheriff, in his zeal to collect a judgment, selects one man as a commissioner who is dependent on him for employment, another who has been frequently associated with the judgment creditor as an employe, and a third whose statements impeach his fairness, and these men place an excessive valuation upon the property, a purpose on the part of the sheriff, judgment creditor and commissioners to make the judgment debtor pay the execution regardless of his homestead rights may be legitimately inferred.

3. FRAUD—*How Proven.*—Questions of fraud are not to be determined solely by the denials and conclusions of the parties interested, but by the circumstances and the words and acts of the parties at the time, whereby the mind is laid bare and its fraudulent purpose exposed.

Bill, for an injunction. Appeal from the Circuit Court of Hamilton County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

T. M. ECKLEY, attorney for appellant.

A. M. WILSON, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee filed a bill in the Circuit Court of Hamilton county to enjoin the appellant, who was sheriff, from selling a certain tract of land belonging to appellee, under an execution issued on a judgment against appellee in favor of one C. G. Cloud.

Appellee was the owner of fifty-five acres of land, on which he, with his family, resided, and which he claimed as his homestead. The sheriff, upon receiving the execution, appointed Beard, Wycough and Neal as commissioners under the statute, to appraise the land and to set off appellee's homestead. Thirty-five acres were appraised at \$1,000 and set off to appellee, and the sheriff levied upon the other twenty acres, and was proceeding to sell the same when the bill in this case was filed to enjoin him from so doing, on the ground of fraud in the selection and proceedings of the commissioners.

The chancellor, on the hearing, set aside the doings of the commissioners, and decreed that the temporary injunction should be made perpetual.

The mere fact that the commissioners may have erred in their judgment as to the value of the property would not justify a court of chancery in setting aside their proceedings. It is proper, however, upon the question of fraud, to show that the property has been greatly overvalued by the commissioners. Such proof has been made in this case. The evidence shows quite conclusively that the land is not worth more than fifteen dollars an acre, or but little more than \$800 for the entire tract, while the part set off to appellee is worth less than \$600.

The Constitution, Art IV, Sec. 32, provides that the legislature shall pass liberal homestead and exemption laws. But it would be folly for the legislature to obey this mandate of our organic law, if the courts are unable to maintain

Buck v. Mitchell.

the homestead right against the unfairness or fraud of avaricious creditors, or the excessive zeal of officers who seek to acquire a reputation for ability to collect judgments in defiance of the exemption laws.

The fact that property worth not more than \$600 has been valued by the commissioners at \$1,000 is calculated to arouse suspicion, and to call for a careful scrutiny of the transaction for circumstances indicative of fraud.

The evidence in this record shows that Beard, one of the commissioners, was the jailor of Hamilton county, appointed as such by appellant, but receiving his compensation from the county. It further appears that Beard and the sheriff were on very friendly terms, and that Beard was frequently at the sheriff's office.

Neal, another of the commissioners, had been an employe of Cloud, the judgment creditor, from time to time during the two or three years preceding the appraisement of the property in question. This employment, which in each instance was for the particular transaction only, related to the sale of real estate, to the oversight of Cloud's farm, or to any other work in which Cloud required assistance. Cloud seems to have reposed confidence in Neal and to have acted generally on that gentleman's judgment.

When Cloud was asked on the trial whether or not he had suggested the names of any of the commissioners to the sheriff, he answered, "I don't *think* I did." He admits, however, that on the day before the appraisement he asked Neal if he could go on the following day, and that he understood, from some one, who were going as commissioners.

Appellee testified that Wycough, the other commissioner, told him that they, the commissioners, were instructed to set off twenty acres "regardless of what it was worth." This conversation was so closely connected with the appraisement as to be admissible as part of the *res gestae*. Wycough swore that he did not make such a statement. But the chancellor, who saw the witnesses, had a better opportunity to judge of their credibility than we have and we are disposed to abide by his judgment.

Wycough testified that he said to appellee, just as the appraisement was completed, "Mr. Mitchell, I am of the same opinion I was before; you had better fix this thing up; you have got too much property and land to keep from paying that debt." This statement clearly shows that Wycough had formed an opinion on the subject, and had probably expressed his opinion, on some former occasion, and was determined to assist the officer in compelling appellee to pay the judgment.

In another part of the conversation, Wycough asserted that Cloud was "all right." Cloud was a banker, and Wycough had developed from the larval state of a farmer into the chrysalis state of a money-lender, and each of them doubtless looked upon the other with favor.

Questions of fraud are not to be determined solely by the denials and conclusions of the parties interested, but by the circumstances, by the words and acts of the parties at the time, whereby the mind is laid bare and its fraudulent purpose exposed.

It is not necessary to hold that appellant or Cloud actually instructed the commissioners to defraud appellee, or that the commissioners actually agreed to do this nefarious act. The law contemplates the selection of fair-minded, disinterested and competent men to act as commissioners. If the sheriff, in his zeal to return an execution fully satisfied, selects one man as commissioner, who is dependent upon himself for his position, and another who has been frequently associated with the judgment creditor as an employe, and another whose statements impeach his fairness in the particular transaction, and these men place an excessive valuation upon the property so as to make \$600 stand for \$1,000, these are facts from which a purpose on the part of sheriff, judgment creditor and commissioners to make the judgment debtor pay the execution, regardless of his homestead rights, may be legitimately inferred.

The appraisement in the case is tainted with fraud, and the chancellor did right in nullifying the proceedings.

The decree is affirmed.

McClary v. Warner.

Jane McClary v. Lee Warner.

1. **HUSBAND AND WIFE—Liability of Husband for Support of Wife.**—If a husband fails or refuses to support his wife and children, and consents to their living with and being supported by another he will be liable for such support.

2. **PRACTICE—Taking the Case from the Jury.**—Where there is evidence on which in the eye of the law the jury can reasonably find in favor of the party holding the affirmative, it must be left to them to determine its weight and effect, and the exclusion of such evidence, and the instruction of the jury to find for the other party, is error requiring a reversal on appeal.

Attachment.—Appeal from the Circuit Court of Lawrence County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

T. B. HUFFMAN, attorney for appellant.

HUFFMAN & MESERVE, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT
Appellant sued out a writ of attachment against appellee, who was a non-resident of this State, and the writ was levied upon certain real estate, as his property, on January 15, 1896. On January 21, 1896, appellant filed her declaration in assumpsit against appellee, averring he was indebted to her in the sum of \$2,000 for board, lodging, care, attention, schooling and doctoring of the wife and three children of appellant for the space of seventy-five months. Pleas of the general issue and of the statute of limitations were interposed, and issue was joined thereon. A trial was had and after plaintiff had introduced all of her evidence to the jury, the court, on the motion of defendant, instructed the jury to find a verdict for the defendant, which they did. Appellant filed a motion to set aside the verdict, and for a new trial, which the court denied, and entered judgment against her for costs. To reverse this judgment, this appeal is taken.

Among the errors assigned are: That the court erred in sustaining the motion to instruct the jury to find for the defendant under the evidence submitted; that the court erred in instructing the jury to find a verdict for the defendant; that the court erred in not permitting the case to go to the jury on the evidence submitted.

We are satisfied from an examination of the evidence that the errors are well assigned, and the jury should have been permitted to find a verdict from the evidence. In 1889 appellee left Illinois and went to Montana, where he has ever since resided. His wife and three children were left in Illinois and were afterward sent out to him, and remained about eighteen months, when they returned to the house of plaintiff, but not by reason of any request or procurement of plaintiff. Appellee, so far as the evidence shows, furnished no home, nor any means of support, for his wife or children, while they were with him; and since they have lived with appellant, and have been supported by her, has known and consented to their being so supported, has been requested by appellant to pay for such support, has never denied his liability, nor taken, nor offered to take, his wife and children back. A letter from him, in reply to a letter demanding payment for the support of his wife and children tends to prove his acknowledgment of liability therefor, and a promise to pay the same.

All these facts were pertinent to the issue, and should have been submitted to the jury. In the absence of any special promise of a husband to pay for the board and lodging of his wife, living apart from him, to a third person, he will not be responsible therefor unless she was living separate from him by his consent, or his conduct was such as to justify her leaving his bed and board. Schnuckle v. Bierman, 89 Ill. 454.

In Wilson v. Bishop, 10 Ill. App. 590, which was an action of assumpsit to recover for board, lodging and other necessaries furnished by the plaintiff to the wife and infant child of the defendant, the court held that, although a husband is not liable even for necessities furnished his wife

Hallbeck v. Stewart.

while residing apart from him without his consent, and without good cause, yet if the separation is caused by improper treatment on his part, such as would justify her in leaving him, he is liable for her necessary support, and it is a proper subject for the jury to say from the evidence whether his conduct was such as to justify the wife in refusing to live with him. The evidence in the case at bar tended to prove that the appellee failed and refused to support his wife and children, and that he consented to their living with and being supported by appellant. In Frazer v. Howe, 106 Ill. 563, it was held, that where there is evidence on which, in the eye of the law, the jury can reasonably find in favor of the party holding the affirmative, it must be left to them to determine its weight and effect, and a motion to exclude such evidence and to instruct the jury to find for the other party ought to be denied. People v. People's Ins. Ex., 18 N. E. Rep. 774; National Syrup Co. v. Carlson, 40 N. E. Rep. 492; C. & A. R. R. Co. v. Heinrich, 41 N. E. 551; New York Cent. & St. Louis Ry. Co. v. Luebeck, 54 Ill App. 97, are also in point.

The court erred in instructing the jury to find for the defendant, and the judgment is reversed and the cause is remanded.

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Otto L. Hallbeck and Oliver S. Stewart v. Alice C. Stewart.

1. **CONDITIONAL SALES—*Rights of the Parties.***—A contract of sale which provides that the title to the property, and the ownership and right of possession thereof, shall not pass to the vendee until the purchase price is fully paid, and that the vendor may take possession of the property whenever he shall deem himself insecure, is a conditional sale, the title does not vest in the vendee until the conditions of the contract are fully complied with, and the vendor has the right, as between the parties, to take possession of the property in accordance with the terms of the contract.

2. **SAME—*Widow of Vendee Claiming Award Not a Third Party.***—

VOL. 69.]Hallbeck v. Stewart.

The widow of the vendee, under a conditional contract of sale, attempting to collect an award, is not a third party to the contract within the meaning of the law, but stands in her husband's place and can not lay claim to property which was not his. If the husband at his death was not the owner of the property, his death will not give the widow a right to claim it on her award.

Trover.—Appeal from the Circuit Court of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

MUNDY & ORGAN, attorneys for appellant.

LEEDS & RAMSEY, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

On December 13, 1894, appellant Hallbeck made a conditional sale to Edward F. Stewart of a mounted cyclone picket and lath mill for the consideration of \$230 for which the purchaser gave three notes with appellant O. S. Stewart, as surety, for the principal sums of \$100, \$75 and \$55, and payable respectively in sixty days, twelve months and fifteen months after date. Each of these notes provided that the title to the machine and the ownership and right of possession thereof should not pass until the note and interest thereon should be paid in full, and that the payee should have full power to declare the note due, before maturity, and to take possession of the machine whenever he should deem himself insecure, and to sell the same at public or private sale, applying the proceeds thereof to the payment of whatever of the purchase price might then remain unpaid.

This was a conditional sale, and the title to the property did not pass to the vendee until the conditions of the sale were fully complied with, and the vendor had the right, as between the parties, to take possession of the machine in accordance with the terms of the contract. *Brundage v. Camp*, 21 Ill. 330; *Murch v. Wright*, 46 Id. 487; *Lucas v. Campbell*, 88 Id. 447; *Latham v. Sumner*, 89 Id. 233; *Fairbanks v. Malloy*, 16 Bradw. 277.

Hallbeck v. Stewart.

Undoubtedly the law is otherwise as to *bona fide* creditors of, or purchasers from, the vendee, while the property is still in his possession, as is shown by the foregoing authorities, and by many others which might be cited.

The question in this case is, whether or not appellee is a third party to appellant Hallbeck within the meaning of the law.

Edward F. Stewart died on April 8, 1895. An administrator of his estate was duly appointed, and an inventory, which included this machine, was duly filed. Appellee, the widow, selected this machine, appraised at \$125, as part of her award, and took possession of the same. There was not sufficient property to satisfy the widow's award. Appellants thereupon took possession of the machine, without the widow's consent, and sold the same at public sale for \$50, and credited the proceeds on one of the notes. The first note was due when the maker died, and no payment was made on either of the notes either before or after the maker's death.

Appellee brought an action of trover against appellants for the conversion of the machine, and recovered a judgment against them for \$100, which was about the value of the machine at the time of the alleged conversion thereof.

Authorities are cited by appellee's counsel to show that the widow may have the real estate of her deceased husband sold for the payment of her award. It is said, therefore, that appellee, being a creditor of the estate, is a third party and as such can hold the machine against her husband's vendor.

But it is held in *Sumner v. McKee*, 89 Ill. 127, that although a chattel mortgage becomes void as to third persons if the mortgagee does not take possession of the chattels upon the maturity of the note, yet the widow of a mortgagor is not a third person within the meaning of the law, and acquires no right to hold the chattels on her award because of the failure of the mortgagee to take possession of the property.

The principle thus announced controls the decision of the case at bar. The widow stands in her husband's place.

She can not lay claim to property which was not his. If the husband at his death was not the owner of the property his death does not confer title upon him. How then can the property be held by the widow as a part of her award, when her right to an award arises by reason of, and therefore after, her husband's death?

Some emphasis is placed on the fact that appellants did not take the machine until after appellee had selected and taken possession of the same as a part of her award. This fact could be material only on the question of estoppel, and the evidence in this case does not justify the application of the doctrine of estoppel against the appellants.

The judgment is reversed and the cause is remanded.

Jasper Cipher v. McFall & Whittington.

1. **SURETIES--*May be Preferred by Failing Debtor.***—A debtor may secure, indemnify or otherwise protect his surety in preference to other creditors. A surety stands in just as favorable relation to the right of preference as any other creditor, even though the debt is not due.

Transcript, from a justice of the peace. Appeal from the County Court of Franklin County; the Hon. ROBERT M. FARTHING, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

FLANNIGAN & PAYNE, attorneys for appellant.

HART & SPILLER, attorneys for appellees.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The facts out of which this case arose, in brief are, that John W. Cipher sold his store on the 20th day of August, 1895, to William Hudleson, for \$468, for which the latter executed his notes, four of them, for \$50 each, the first of said four notes being due October 20, 1895, and the others

Cipher v. McFall & Whittington.

falling due on the 20th of November, December and January following, respectively; the fifth note falling due September, 1896.

Two of these fifty dollar notes were assigned by John W. to Jasper Cipher, as claimed, the latter part of August, or first of September, 1895, in consideration of \$59, which it is claimed the former was owing the latter, and to enable him to pay a \$50 note due to Hamilton, given by John W. Cipher, on which Jasper was surety. The assignee received and retained possession of said notes.

On the 24th day of September, 1895, appellee obtained judgment against John W. Cipher before a justice of the peace, on which execution was issued and returned "no property found," and thereupon garnishee summons was issued and served on William Hudleson, as a debtor of John W. Cipher. At the time set for trial, Jasper Cipher, the appellant, appeared and claimed to be the owner of said two notes, whereupon a trial was had on said issue and found against the claimant. An appeal was taken to the County Court, where on trial a like result followed, from which this appeal is prosecuted.

It appears from the evidence that the Hamilton note was due before the assignment of the notes to appellant, and Hamilton had demanded payment. It also appears that appellant paid the Hamilton note, on which he was surety, but not until after the commencement of this suit. The case turns or depends largely on this transaction.

The court below held that if the Hamilton note was not paid by Jasper Cipher until after the assignment of the Hudleson notes to him, that such assignment by J. W. Cipher, in consideration that Jasper Cipher was to afterward pay the Hamilton note, was void as to the creditors of J. W. Cipher. Appellee here insists that is the law, and cites Darst v. Bates et al., 51 Ill. 439; Stevens v. Hurlburt, 25 Ill. App. 125; in support of the proposition. In this position appellee is in error and the cases cited do not sustain him. They merely hold that a surety can not maintain his action until he has paid the debt for which he is surety.

It is well settled law, however, that a debtor may secure, indemnify or otherwise protect his surety in preference to other creditors. Such surety, though the debt is not due, stands in just as favorable a relation to the right of preference as any other creditor. Morris v. Tillson, 81 Ill. 607; Welsch v. Werschem, 92 Ill. 115; Wood v. Clark et al., 121 Ill. 359.

The case of Hulse v. Mershon, 125 Ill. 52, and Frank v. King, 121 Ill. 250, in no way conflict with this doctrine. In the latter case it is simply held that as between husband and wife, where a preference is given, the proof must be clear and satisfactory of the indebtedness, not that it is due. This language, "clear and satisfactory," measures the degree and character of proof that should be required, but it is not proper to incorporate that language in an instruction. Bitter v. Saathoff, 98 Ill. 266; Bauchwitz v. Tyman, 11 Ill. App. 186. The other case simply holds that a debtor in failing circumstances can not give away a part of his estate, as against other creditors, in the way of attorney's fees in a note.

This case was tried on an erroneous theory of the law, and will have to be reversed and remanded, and it is so ordered.

Henry Smith v. The J. A. Sommers Mfg. Co.

1. **HUSBAND AND WIFE—Transfers of Property Between.**—A transfer of property from a husband to his wife, while they are living together as such, to be valid as to third persons, must be in writing, acknowledged and recorded in the same manner as a chattel mortgage. (Sec. 9, Chap. 68, R. S.)

2. **GIFTS—By a Husband to his Wife.**—A gift to a wife from her husband to the injury of his creditors is unlawful.

Trial of the Rights of Property.—Appeal from the Circuit Court of Clay County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

Smith v. J. A. Sommers Mfg. Co.

R. S. C. REAUGH and HOFF & HOFF, attorneys for appellant.

HAGLE & SHRINER, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee obtained judgment against Edgar A. Medley, on which an execution was issued and a levy made on a stock of goods. On the 8th day of January, 1896, Elizabeth C. Medley gave the sheriff written notice that she was the owner of said entire stock of goods and intended to prosecute her claim to the same. The notice was signed by the claimant by her attorney, R. S. C. Reaugh. On the 15th day of January, 1896, Henry Smith, the appellant, by the same attorney, gave the sheriff written notice that he was the owner of said goods, except such part as belonged to Elizabeth C. Medley, and that he intended to prosecute his claim. A trial was had in the Circuit Court on the latter claim, and a verdict and judgment resulted in favor of appellee, and against the claimant, from which this appeal is prosecuted.

The principal contention is that the judgment is not supported by the evidence. It is claimed by the appellant that he sold the stock of goods in the fall of 1894, to Edgar A. Medley, his son-in-law, for \$1,600, and took no notes or security therefor; that some money was paid to him at different times, just how much he does not know; that in the spring of 1895, a fire broke out in the building in which the stock was kept, which damaged the stock, not a great deal, however, as the evidence is understood; thereafter, appellant claims, about the last of May or first of June, he demanded more money of Medley, which he not being able to pay, the stock was, by some arrangement, transferred to pay the balance due, then claimed to amount to over \$900; that thereupon he claims he took possession for a time, and then put his daughter, Mrs. Medley, into possession, who, it is claimed, run the store, and kept the key to the building till the levy.

The evidence presents a peculiar state of affairs. In the first place, after the levy, Mrs. Medley claimed the entire stock, and gave notice to that effect. The evidence is replete with her statements, which she admits making, as well as of her husband, that she was the owner of the goods. They made that claim to the sheriff and other parties without saying that appellant had any interest. They claimed the transfer to Mrs. Medley was made by her husband in August, 1895. There is no claim that she paid any money or gave any notes, or that she had any money or property in her own right with which to pay for the goods. The husband was being hard pressed to pay his debts. He requested the sheriff not to make this levy, as it would bring other creditors on him, and in any event to give him as long time as possible. In both claimed transfers of the stock of goods to Henry Smith and Mrs. Medley there is an utter absence of business methods in the transactions, and as to keeping account of how much was paid or when paid. Mrs. Medley, on the witness stand, in effect, claimed the property was hers; that she had paid her father nearly all that was coming to him. He testified to the same, without telling when or how. She says she held the keys until the sheriff came and demanded them, and that the arrangement was, "I was to pay off the debt that Medley owed my father. If there was anything left the store was to be mine." The most that can be made out of this tangle, in which these parties have involved themselves is, that Edgar A. Medley was involved in debt, and that by arrangement between the parties, the wife was to run the store, sell goods and pay off the debt of the claimant, her father, which, according to the testimony of both of them, has been substantially paid, and she was to have what was left. She put in some additional stock, so as to keep it up, as she claims, how much is not stated, evidently not much. No provision was made as to the other creditors. Was this a legal and lawful transaction as to them, assuming there was an open transfer, which is denied by appellees? She paid nothing for the goods to her husband, nor promised to pay

I. C. R. R. Co. v. Batson.

him anything, and paid nothing on the debt of her father to her father except out of money received from the sale of the stock. There was no writing evidencing a sale as between the husband and wife or between the wife and her father. If she assumed to get title from her husband, then to be valid as to third persons, as they were living together, such transfer had to be in writing, acknowledged and recorded in the same manner as a chattel mortgage. Sec. 9, Chap. 88, Hurd, p. 807. If she assumed to get title from her father, who evidently only held it as a lien to pay his debt, then the mutual arrangement by which she was to have the surplus, which was all that was levied upon, as the father's debt had been paid, was a gift on the part of the husband to the injury of his creditors, and was unlawful. *Mitchell v. Byrns*, 67 Ill. 522; *Hocket v. Bailey*, 86 Ill. 74.

If the transfer of the title to Smith was to secure his debt, and, giving the transaction the most favorable view, more than this was not intended, then the transfer of the property by Smith to his daughter, under the arrangement that she was to have the surplus on payment of the debt, which debt, in fact, has been paid, though no formal settlement has been made, would in any event deprive this claimant of any right to the property as against creditors.

Substantial justice has been done in this case and the judgment is affirmed.

Illinois Central Railroad Company v. H. H. Batson, Adm'r.

1. INSTRUCTIONS—*Care in Running Trains Over Highway Crossings.*—In a close case, upon the question of negligence and ordinary care, it is error to instruct the jury that the deceased, in approaching and crossing a public thoroughfare, had a right to suppose and presume that a train of cars passing over such thoroughfare would be run with caution and due regard to the safety of persons passing along the same.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Jackson County; the Hon. OLIVER A. HARKER, Judge, presid-

ing. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

WILLIAM H. GREEN, attorney for appellant; JAMES FENTRESS, of counsel.

A. S. CALDWELL and R. J. McELVAIN, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Main street runs east and west in Carbondale and is crossed near the heart of the city by appellant's road, which consists of three tracks at that point, the house track, the passing track and the main track, naming them in order from the west. Irvin C. Batson, the deceased, an active, intelligent man, sixty-three years of age, had lived in Carbondale for many years, and was familiar with the road and its surroundings at and near Main street, and knew that much freight was handled and much switching done by the railroad company at that place.

At about nine o'clock on the morning of June 5, 1895, Batson had occasion to pass from the west to the east side of the tracks on Main street. The local freight, which had been engaged in switching cars, was backing north on the passing track over Main street, for the purpose of coupling to the caboose, when Batson stepped in front of the train and was run over and killed. The train when backing from the south was in full view, and would have been seen by Batson if he had looked in that direction. Before going upon the track he passed others who were standing near the track and whose manner was such as to indicate that they were waiting for a train to pass. But neither the attitude of these persons nor the shouts of the trainmen, warning him of his danger, sufficed to arrest his progress or cause him to look up and down the track for approaching trains.

The reason given for this strange conduct is that a long

I. C. R. R. Co. v. Batson.

freight train was passing south on the main track at the time, and that Batson was watching this train to see when the caboose would clear the street. In answer to this, it is claimed by appellant that the train on the main track had cleared the street before appellant stepped upon the passing track.

It is not necessary for us to enter into the discussion of this question, however, or to consider the evidence in the case further at this time. Enough has been said to show that the question as to whether or not Batson was in the exercise of ordinary care when he was killed is a very close one, and that the jury should have been accurately instructed upon this important branch of the case. Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296. See also I. C. R. R. Co. v. Sanders, 58 Ill. App. 117, and authorities cited near the close of the opinion.

The third instruction, given at the request of appellee, tells the jury that if Main street was one of the most public thoroughfares in Carbondale, Batson, in approaching and crossing the tracks, had a right to suppose and presume that the train passing over said street would be run with caution and with due regard to the safety of persons passing along the street. If this is the law, then it was impossible for Batson to be guilty of negligence. The instruction does not contemplate an act done in a fit of abstraction, or under circumstances sufficient to divert the attention of an ordinarily careful person from impending danger. To suppose or to presume anything is to think of it, to consider it, to make up one's mind on the subject. If Batson had the right to presume that there was no danger, then he was under no obligation to exercise any degree of care whatever for his safety.

But appellant is not liable unless Batson was himself in the exercise of ordinary care when he was killed; and this does not depend upon a right to presume that there was no danger, but upon all the facts and circumstances of the case which tend to show that Batson was or was not exercising that degree of care which an ordinarily prudent person, sim-

VOL. 69.]

Grieb v. Caraker.

ilarly situated, would have exercised. C. & A. R. R. Co. v. Sanders, 154 Ill. 531.

The language of the court in W. St. L. & P. Ry. Co. v. Wallace, 110 Ill. 114, is especially pertinent in this connection: "In this case both parties knew that the place where the accident occurred was more than usually hazardous, and, knowing that fact, both parties were under the duty of using more caution than at ordinary crossings."

For the error pointed out, the judgment is reversed and the cause is remanded.

John M. Grieb v. Walter M. Caraker.

1. **FRAUDULENT CONVEYANCES—Consideration—Other Objects in View.**—Where a conveyance is made to hinder and delay creditors, it is void as to them, whether made with or without a consideration, and even though the debtor may have had some object in view besides the unlawful one in making the conveyance.

2. **SAME—Conveyances From Father to Son.**—Where a conveyance of property by a father to his son is made by one, and accepted by the other with the deliberate intention of hindering and delaying the father's creditors, the son can not hold the property as against the father's creditors, even though he may have obligated himself to pay one of his father's debts.

Trial, of the rights of property. Appeal from the Circuit Court of Marion County; the Hon. JOSEPH P. ROBARTS Judge, presiding. Heard in this court at the August term 1896. Reversed and remanded. Opinion filed March 3, 1897.

KARRAKER & LINGLE, attorneys for appellant.

DODD & PICKRELL, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The controlling facts in this case are simple and are easily stated. George W. Caraker was indebted to appellant and other creditors, among them his nephew, Jacob Caraker, to whom he owed \$325, which was secured by an unrecorded chattel mortgage.

Grieb v. Caraker.

George made a pretended sale of about \$600 worth of personal property to his minor son Walter, the appellee herein, on the sole consideration that Walter should pay the amount due Jacob, as aforesaid, for which Walter had given his note with personal security. On October 7, Jacob, acting as the amanuensis of William Johnson, wrote a letter to George, advising him to go if he intended to go, but to pay Grieb (the appellant) if he did not intend to go. This letter was delivered to George on the same day. On October 9th, which was Monday, George gathered together the remainder of his personal effects, and, accompanied by his son Walter, who was an unmarried man and had been living with his father, set out for Missouri, at the early hour of three or four o'clock in the morning. This sudden migration was a surprise to appellant and to others of George's creditors, who proceeded to sue out writs of attachment and to cause them to be levied on the property left behind. On October 11th, Walter, who had returned from Missouri, asserted his right to the property, claiming that he had bought it in the month of September, for the consideration above mentioned. However this may be, the evidence shows conclusively that the creditors were not advised of any change in the ownership of the property, either by a transfer of the possession or control of the property, or otherwise, prior to the commencement of the attachment suits.

The law is that where a conveyance is made to hinder and delay creditors, it is void as to them whether made with or without a consideration, and even though the debtor may have had some object in view besides the unlawful one in making the conveyance. Boies v. Henney, 32 Ill. 130; Reed v. Noxon, 48 Id. 323; Weber v. Mick, 131 Id. 520; Fleming v. Hiob, 3 Bradw. 390; Cowling v. Estes, 15 Id. 255; Thorne v. Crawford, 17 Id. 395.

There can be no doubt under the evidence in this case that the conveyance by the father to the son was made by the one and accepted by the other with the deliberate intention of hindering and delaying the father's creditors. This being true, the son can not hold the property as against

the father's creditors, even though he may have obligated himself to pay one of his father's debts, amounting to a little more than half of the value of the property claimed by virtue of the fraudulent sale. If the obligation to pay a just debt validates the transaction, then every fraudulent sale can be made lawful, and ten thousand dollars worth of property can be put beyond the reach of creditors if the grantee will bind himself to pay even one of the grantor's smallest obligations.

When this case was before us on a former occasion we reversed a judgment in favor of the claimant on the ground of error in the instructions. 57 Ill. App. 678. We reverse now on the ground that the verdict is manifestly against the weight of the evidence.

The judgment is reversed and the cause is remanded.

Karl D. Lengfelder v. A. K. Smith.

1. EQUITY PRACTICE—*No Evidence Necessary to Support a Decree Dismissing a Bill.*—A decree dismissing a bill or petition needs no evidence to support it. It is supported by the absence of evidence, since that is the proper decree where there is no evidence or where it is insufficient to authorize the relief asked for.

2. APPELLATE COURT PRACTICE—*Exceptions not Taken in the Court Below.*--The question of the propriety of the ruling of the trial court upon a motion to apportion the costs can not be raised in the Appellate Court when no exceptions have been taken to such ruling in the court below.

3. INJUNCTIONS—*Assessment of Damages on Dissolution.*—The court can not assess damages upon the dissolution of an injunction without evidence supporting such assessment.

Bill, for an injunction. Error to the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1896. Affirmed in part and reversed in part. Opinion filed March 3, 1897.

LAIRD & LAIRD, attorneys for plaintiff in error.

Lengfelder v. Smith.

GEORGE B. LEONARD, attorney for defendant in error.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

In this case a temporary writ of injunction was granted, on the application of plaintiff in error, restraining the defendant in error and his attorneys, solicitors, agents and servants, from removing, tearing down, or in any way meddling with certain fences. An answer was filed to complainant's bill denying all the material allegations thereof, and after several continuances at the instance of complainant, the cause was heard upon the bill and answer, and proof in open court.

The court found the equity of the cause to be with the defendant, and entered an order that the cause be dismissed and the injunction be dissolved. It was further ordered that the defendant recover judgment against complainant for \$30 damages, on suggestion of defendant. The court also overruled complainant's motion to apportion costs, but no exception was taken to this ruling, and hence the question of its propriety is not presented. It is contended on behalf of plaintiff in error that there is no evidence in the record on which to base the decree, or to authorize the assessment of damages; that the only reference made to evidence is the statement in the decree: "And this cause coming on to be heard upon the bill of complaint and answer of defendant, proofs being heard in open court, the court finds," etc.

A decree dismissing a bill or petition needs no evidence to support it. It is supported by the absence of any evidence, since that is the proper decree in case there is no evidence, or if the evidence is insufficient to authorize the relief prayed for. It would be different if affirmative relief had been granted. Parsons v. Evans, 17 Ill. 238; Culver v. Hide & Leather Bank, 78 Ill. 635; First Nat. Bank v. Baker, 161 Ill. 281. No reason for reversal is therefore furnished in this case, because the evidence on which the decree is based does not appear in the record. But it was error to assess damages without hearing evidence authorizing such assess-

ment, and this it appears the court did. So much of the decree as dissolved the injunction and dismissed the bill is affirmed; but so much thereof as awarded damages is reversed and cause remanded. *Hamilton v. Stewart*, 59 Ill. 330; *Steele v. Boone*, 75 Ill. 457.

Affirmed in part and reversed in part.

Julia D. Ramsay et al. v. Wm. H. H. Nichols.

1. **MECHANIC'S LIEN—*Repairing Separate Tracts, etc.***—A party furnishing labor and materials in repairing separate pieces of property, under an implied contract with the owner, to be paid therefor as much as the same are reasonably worth, becomes entitled to a lien upon each piece of property for the amount due him for such repairs thereon, upon filing his affidavit with a just and true statement of the amount due him, as required by the statute.

Mechanic's Lien.—Error to Circuit Court of Clinton County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

STATEMENT OF THE CASE.

Defendant in error filed his petition for mechanic's lien in the Circuit Court, and made all the heirs at law and the administrator of the estate of Rufus N. Ramsay defendants. The cause was heard upon answers of each adult defendant, and the answer of the minor defendant by her guardian *ad litem*, to which answers replication was filed, and upon the issue thus made the evidence was heard by the court and a decree was entered, finding that the court had jurisdiction of the parties and subject-matter of said suit; that the matters stated in the petition are true, and that the equities are with the complainant; that he is a mechanic, viz., plasterer, paper hanger and brick mason; that on or about April 16, 1894, Rufus N. Ramsay, now deceased, at that time and on

Ramsay v. Nichols.

divers days thereafter, desired petitioner to furnish materials and labor for and in repairing his residence, situate on W. $\frac{1}{2}$, block 63, Bruse's 1st Add. to the town (now city) of Carlyle, and in repairing his banking house and store building, situate on lot 10, block 40, Middle Town, now city of Carlyle, and repairing his tenant house, situate on lot 9, in block 32, in said Middle Town, all in Clinton county, Illinois, by papering, laying brick, patching and furnishing materials and labor thereon in repairing said houses on the premises aforesaid, then owned and which were owned at the time of his death, by said Rufus N. Ramsay, and thereupon a verbal contract was entered into between petitioner and said Ramsay, to furnish materials and labor in papering, plastering, cementing and patching the said houses on said premises, on and at the dates specified in petitioner's account of such labor and materials, as follows:

1894.	April 16.	To labor, patching, materials, hanging paper and pump repairs....	\$21.00
"	April 20.	To cement and sand.....	1.50
"	April 23.	To labor and material, repairing cellar.....	4.30
"	May 9.	To material, brick, sand and hauling for privy vault.....	6.50
"	Oct. 8.	To repairing grate and material....	1.00
		Total.....	\$34.30

The above material and labor was furnished and used on his residence, situate on W. $\frac{1}{2}$, block 63, in Bruse's 1st Add. to town of Carlyle, Ill.

May 12.	To labor and material and repairing tenant house.....	\$7.65
May 14.	To cleaning out well, materials and labor on same.....	3.75
May 21.	To putting chain pump in well.....	6.50

Total.....\$17.90

The last above materials and labor were furnished and

VOL. 69.]Ramsay v. Nichols.

used on tenant house situate on lot 9, blk. 32, in Middle Town, Carlyle, Ill.

Aug. 23. To labor and materials on bank building.. \$59.50

Oct. 20. To patching on store room..... .65

Total.....\$60.15

The last above materials and labor were furnished and used on bank building, situate on lot 10, block 40, Middle Town of Carlyle.

And it was further agreed by said Ramsay that he would pay petitioner for such labor and materials upon said buildings as much as the same were reasonably worth, to be paid when said labor and materials were performed, furnished and completed, and petitioner did in pursuance of said agreement at once and at the various times, as mentioned in his said account, furnish all necessary materials and labor for the proper repair of said buildings, and as directed by said Ramsay; that said items of said account are, and each of them is, fairly and justly set down; that the price charged for each article or item is fair and reasonable; that said materials so used in said buildings were of good quality, and the work and labor done thereon was in a good workman-like manner; that said buildings were fully repaired by petitioner and accepted by said Ramsay; that \$112.35 is now due petitioner for said work and materials on said buildings, which sum nor any part thereof has been paid petitioner; that petitioner filed his affidavit for the purpose of creating a lien against said premises on February 2, 1895, in the circuit clerk's office, Clinton Co., Illinois; that said Rufus N. Ramsay died intestate November 11, 1894, leaving him surviving Julia D. Ramsay, his widow, Effie Ramsay, Edna Ramsay, and E. P. Ramsay, his children and only heirs at law.

Upon these findings of fact, the court decreed the petitioner was entitled to a lien for \$112.35 on said premises, to wit: \$34.30 lien on W. $\frac{1}{2}$, blk. 63 Bruse's 1st Add. to Town of Carlyle; \$17.90 lien on lot 9, B. 32 Middle Town of Carlyle; and \$60.15 lien on lot 10, blk. 40, Middle Town of Carlyle; and that petitioner have a lien on said premises for

Ramsay v. Nichols.

said respective sums, with five per cent interest thereon from the date of decree, with costs of suit, to be paid to the petitioner out of the proceeds of the sale of these respective tracts of land, when sold by the administrator of the estate of Rufus N. Ramsay, deceased, under a former decree of this court for the sale of said premises and other lands by said administrator to pay the debts against said estate.

H. V. MURRAY and M. P. MURRAY, attorneys for plaintiffs in error.

JNO. J. McGAFFIGAN, and J. G. IRWIN, attorneys for defendant in error.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

We have examined this record, and it fully supports the findings of facts as set forth in the foregoing decree.

Petitioner furnished labor and materials in repairing on three separate pieces of property, under an implied contract with Rufus N. Ramsay, then the owner thereof, to so furnish said materials and labor, and be paid therefor the sum such materials and labor were reasonably worth when all of the same had been so furnished and performed. The first labor and materials were furnished on April 16, 1894, and the last on October 26, 1894. At this last date petitioner was entitled to his pay therefor, and, as a mechanic, became entitled to a lien upon each piece of said property for the amount due him for so repairing thereon. Within four months from that date, viz., on February 2, 1895, petitioner filed his affidavit with a just and true statement of the amount due him for such materials furnished and labor performed. The affidavit and accompanying account were such as the statute required. Hays v. Hammond et al., 44 N. E. Reporter, 422, and were filed with the circuit clerk in apt time.

The court properly found the amount which petitioner proved he was entitled to for repairing on each piece of property, and decreed a lien for the several amounts on each of said pieces, as was right under the proof. The decree is affirmed.

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170 354

John W. Lewis v. The People, use of, etc.

1. **APPEALS—*In Bastardy Cases.***—An appeal in a bastardy proceeding lies directly to the Appellate Court.

Bastardy Proceedings.—Appeal from the Circuit Court of Jackson County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

HILL & MARTIN and R. J. McELVAIN, attorneys for appellant.

R. J. STEPHENS and A. B. GARRETT, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This was a proceeding in the County Court, under the bastardy act, where judgment was obtained against appellant, who appealed to the Circuit Court, where, on motion, the appeal was dismissed for want of jurisdiction.

The appellant relies on an opinion filed in the Stivers case, and reported in the N. E. Reporter, Vol. 38, p. 574, which opinion, however, was recalled, as evidenced by another opinion in same case, going back to the original doctrine of Lee v. People, 140 Ill. 536. The question here involved was considered by this court in Pemberton v. The People, 63 Ill. App. 218, where it was held an appeal in such cases did not lie from the County to the Circuit Court.

The judgment is affirmed.

St. Louis, B. & S. Ry. Co. v. Edward C. Rice.

1. **LIMITATIONS—*New Promise by a Corporation.***—A new promise by one having authority to bind a corporation generally is sufficient to remove the bar of the statute of limitations as to such corporation.

St. L., B. & S. Ry. Co. v. Rice.

Assumpsit, for money expended. Appeal from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

G. A. KOERNER, attorney for appellant.

EDWARD L. THOMAS, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The evidence in this case is conflicting in many particulars, but the court, trying the case without a jury, was justified in finding the facts to be as hereinafter stated.

In 1880 Charles W. Thomas held all the stock of the Belleville City Railway Company, except a very few shares which had been taken by some of his friends. He was secretary of the company. The nature and conduct of the business and the attendant circumstances show that Thomas, who was the owner of about 490 of the 500 shares of stock, was authorized to act for the company generally, and therefore to make such agreements on its behalf as he might deem proper.

Accordingly Thomas authorized appellee to buy a certain right of way for the company for \$1,500, and promised appellee for the company that the latter should repay him the amount so advanced whenever the charter should be utilized. There was a transfer of stock to appellee under an agreement by which he was to become the owner of the franchise on certain conditions, but these conditions were not fulfilled and the stock was retransferred by him to Thomas. This transaction does not affect the liability of the company to pay its indebtedness to appellee in accordance with the agreement above mentioned.

Appellee paid \$1,500 for the right of way and caused it to be deeded to the company.

The only assets of the company were its charter and subscription list, no part of the stock having been paid.

Thirteen years passed away, and Samuel H. Leathe, of

VOL. 69.]St. L., B. & S. Ry. Co. v. Rice.

St. Louis, with others, decided to build a railroad from East St. Louis to Belleville. Leathe was the leading spirit of the enterprise, and was induced by Thomas to act under the charter of the said company, inasmuch as the provisions of the charter were especially liberal.

He was informed by Thomas that the \$1,500 due appellee, and \$500 due himself must be paid by the company, and Leathe acquiesced in this requirement.

At the beginning of the negotiations, when Mr. Leathe examined the charter of the company in the expectation of becoming a purchaser of all the stock, with the exception of a very few shares, the indebtedness of the company to appellee was explained to him, and he was informed that if he got the stock the company must pay the amount due appellee without interest. Leathe agreed to do this. Everybody connected with the company understood the matter thoroughly at the time.

Certain meetings of the stockholders and directors were afterward held for the purpose of making arrangements for perfecting the transfer.

In contemplation of the building of the road under the new management, the capital stock was increased to 5,000 shares of \$100 each, and the issuance of bonds, secured by mortgage, to the amount of \$500,000, for the purpose of raising money to build the road, was ordered.

At a meeting of the directors held on March 25, 1893, a call of one hundred per cent on the capital stock was made, payable on or before May 1, 1893. Thereupon Leathe appeared before the board and proposed to sell and convey to the company certain property for \$499,500, and the board accepted this proposition on certain conditions, and accepted his deed as payment of the call on his 4,995 shares, provided he would float the bonds of the company, and account at their par value for all bonds he might take or use in paying for property or *prior indebtedness of the company*.

The evidence shows that this indebtedness was talked over at the time and included the \$1,500 due appellee.

Leathe was required to sign and did sign the record of

St. L., B. & S. Ry. Co. v. Rice.

these proceedings for the purpose of showing his acceptance of the terms of the transfer.

Leathe became the owner of 4,995 of the 5,000 shares of stock, and at a meeting of the stockholders was duly chosen president. Thomas continued to act as secretary. There were seven directors. Waddock, one of the directors, tendered his resignation to Leathe about August 1st, but the resignation was not acted upon or accepted by the board till after the meetings of August 9th and 11th, and he was therefore authorized to meet with the board as one of the directors at those meetings.

Leathe authorized Thomas to call a meeting of the directors for August 9th. This was done, and a quorum was present at the meeting, but the board adjourned till the 11th without transacting any business, and notice of the adjourned meeting was given to the other directors.

At the meeting on August 11th a resolution was passed directing the payment of \$1,500 to appellee, as previously agreed upon.

Thomas, who had been acting for appellee all this time with reference to his claim, immediately notified appellee of this resolution.

Leathe was not present at either of these meetings, and insists that they were not lawfully called.

Afterward, on January 24, 1894, appellee called on Leathe and demanded payment of the \$1,500 due him, and Leathe answered that the company would pay it in less than two months.

The evidence on many of these questions is conflicting. The backbone of appellant's evidence is the deposition of Samuel H. Leathe, and that of appellee's evidence is the testimony of Charles W. Thomas. Leathe testified as if he was trying to conceal something, while Thomas testified fairly and frankly. The trial court can not be censured for accepting the version of the transactions given by the witness Thomas.

At a meeting of the board, on August 26, 1893, Leathe caused a resolution to be passed rescinding the proceedings

of the meetings of August 9th and 11th, and accepting Waddock's resignation.

From the foregoing facts it is clear :

1. That in 1890 the Belleville City Railroad Company became indebted to appellee in the sum of \$1,500.

2. That prior to 1893, appellee's claim was barred by the statute of limitations.

3. That the series of transactions in 1893, from the first conversation between Thomas and Leathe to the resolution passed at the meeting of the board on August 11th, shows beyond question a new promise on the part of appellant to pay the amount due appellee, which is sufficient to remove the bar of the statute of limitations.

4. That on January 24, 1894, Leathe, who owned nearly all of the stock, and was the corporation for all practical purposes, and had authority to bind appellant by his promise on its behalf, promised appellee that appellant would pay his demand within less than two months, which promise is sufficient to remove the bar of the statute of limitations.

5. That the resolutions passed on August 11th, which were valid when made, could not be rescinded by the action of the board at a subsequent meeting so as to affect the rights of appellee.

It is said, however, that, even if appellant promised to pay the amount sued for by appellee, yet such promise was a conditional one, and was to the effect that appellee was to be paid out of the proceeds of the sale of the bonds, and that there is no evidence to show that the bonds have been sold.

Without conceding that the promise was conditional, it is sufficient to say that there is an abundance of evidence in the record to show that the bonds were sold two years at least before this action was commenced.

The bonds were issued in 1893, and were placed in Leathe's hands under an agreement by him that he would float them and account for the proceeds. In the same year, according to the uncontradicted testimony of appellee, and the con-

Terhune v. Weston.

cession of counsel for appellant in his brief, the road was built from East St. Louis to Belleville. It may be fairly inferred that, inasmuch as the road could not be built without money, and appellant had no resources for that purpose except money to be obtained by the sale of its bonds, the bonds must have been disposed of by Leathe during the year 1893, before the road was constructed.

If this was not the fact, Leathe had the opportunity to say so in his deposition when the question was asked him by appellee's counsel on cross-examination, and he refused to answer, under the advice of appellant's counsel, on the ground that the question was irrelevant.

We hold that the record shows that the bonds were sold in 1893, and the condition upon which the payment to appellee by appellant was to be made was thereby fulfilled; also that the promise made on January 24, 1894, was unconditional.

It is further urged that there is no evidence to connect appellant with the Belleville City Railway Company. Appellant proved by Samuel H. Leathe that after he had become a stockholder, the name of the company was changed from the Belleville City Railway Company to the St. Louis, Belleville & Southern Railway Company, and appellant will not be permitted to assert now that the testimony of its witness is untrue or incompetent.

It is assigned for error that the court erred in holding and refusing certain propositions of law, but this assignment will be treated as having been waived, for the reason that counsel for appellant has not pointed out in his brief or argument filed herein any objections to the rulings of the court on the propositions of law.

The judgment is affirmed.

E. M. Terhune v. Robert Weston et al.

1. APPELLATE COURT PRACTICE—*Motions to Strike Affidavits From the Files.*—A party can not raise for the first time, in the Appellate Court, the question that an affidavit of claim in the court below was filed

VOL. 69.]Terhune v. Weston.

without leave or not filed in time. A motion should have been made in the court below to strike the same from the files.

Assumpsit, on a promissory note. Appeal from the County Court of Franklin County; the Hon. W. F. DILLON, Judge, presiding. Heard in this court at the August term, 1896. Reversed and remanded. Opinion filed March 3, 1897.

A. C. TERHUNE, attorney for appellant.

C. H. LAYMAN, attorney for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

When appellant, by leave of court, filed his amended declaration, he filed therewith an affidavit of claim. No motion was made to strike the affidavit from the files. Appellee afterward filed a plea without filing an affidavit of merits. Appellant made a motion to strike the plea from the files. The motion should have been sustained. The court had the power to allow an affidavit of claim to be filed with the amended declaration (*Spradling v. Russell*, 100 Ill. 522), and if appellees desired to raise the question that the affidavit was filed without leave, or not in time, they should have made a motion to strike the same from the files. No such motion having been made, the right to file the affidavit of claim stands unchallenged, and the plea should have been stricken from the files.

McWilliams v. Richland, 16 Bradw. 333, is not in conflict with this ruling. In that case the plaintiff did not move to strike the plea from the files, but took issue thereon, and the court held that the right to require the filing of an affidavit of merits could not be afterward asserted.

Under the provisions of the note sued on, appellant had the right to recover a reasonable attorney's fee, and the court erred in disallowing the same.

Appellees can not take advantage of the alleged errors in the rulings against them for the reason that they have assigned no cross-errors.

The judgment is reversed and the cause is remanded.

Mannen v. Payne & Johnson.

**Josiah H. Mannen v. Payne & Johnson, for the use
of, etc.**

1. APPELLATE COURT PRACTICE—*Propositions of Law*.—No questions of law properly arise on appeal unless propositions of law have been submitted to the trial court.

Assumpsit, breach of contract. Appeal from the County Court of Jefferson County; the Hon. WILLIAM T. BONHAM, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

GEORGE B. LEONARD, attorney for appellant.

ALBERT WATSON, attorney for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.
This suit was brought against appellant for the use aforesaid, to recover for the breach of a contract in writing, executed and delivered by appellant to Payne & Johnson, whereby appellant sold to them 35,000 choice brick for the consideration of receipting a store account due them from one Dixon, and their note payable to the order of appellant for \$100. The store account was satisfied and the note was sold by appellant before maturity. The cause was tried by the court, a jury being waved by the parties, and the court found for plaintiffs, for the use of Johnson, and assessed the damages at \$29.70, for which sum and the costs judgment was entered.

No propositions of law were submitted and the only question for the court to determine was, whether or not appellant had fulfilled his contract by furnishing the amount of brick he had agreed to furnish. The evidence justified the court in finding that he had not, and that by reason of such breach plaintiffs were damaged to the amount recovered. The judgment is affirmed.

Joseph Choisser v. Miles K. Young, Receiver, etc.

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1. BUILDING AND LOAN ASSOCIATIONS—*Mortgage Indebtedness Not to be Reduced by Premiums.*—In a suit to foreclose a mortgage by an insolvent building and loan association, the defendant is not entitled to have his mortgage indebtedness reduced by deducting therefrom the premiums paid by him to such association for his loan and legal interest thereon.

2. SAME—*Borrowing Members—No Right to Withdraw Premiums.*—A borrowing member of a building and loan association assumes, with other stockholders, all the risks incident to such relation, and when the association becomes insolvent, he has no more right to withdraw from its assets premiums paid in by him than other stockholders have to withdraw the payments made by them of installments, interest and premiums.

Bill, to foreclose a mortgage. Error to the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

STATEMENT OF THE CASE.

This was a bill filed by Miles K. Young, receiver of the Illinois Building and Loan Association of Bloomington, Illinois, to foreclose two mortgages given by said Joseph Choisser to said association, to secure two loans made to him by the association, one of which loans was \$700 and the other \$300. The answer admits the incorporation of the association, its continuance to do business until October 2, 1894, and its constitution and by-laws as alleged; admits the two sums of money—\$700 and \$300—were borrowed of said association, as alleged by appellant, and that he gave his money, bonds and mortgages to secure such indebtedness as alledged; admits that complainant is the lawfully appointed and qualified receiver of said association as alleged; admits that a certain sum of money is now due from appellant to said association, but alleges the amount so due is much less than the sum claimed in said bill; alleges that defendant, from the time of joining said association and from the time of his obtaining the said two loans, has

Choisser v. Young.

kept and performed all the terms and conditions of his two money bonds and two mortgages, and that from and after the date of said two loans he paid to said association all the interest, all the premiums upon said two loans, all quarterly dues, kept the mortgaged property in good repair, paid all taxes, kept said premises well insured, and on October 2, 1894, had kept and performed all promises in accordance with the terms of his two money bonds and mortgages; that while he bid eighty per cent premium upon the sum so borrowed of said association, the privilege of obtaining said loan was not the sole consideration for such premium, but the manner in which he was allowed to repay the same was a material and important part of the consideration for which said premium was bid; that defendant is entitled to have credited upon said loan of \$1,000, the premiums paid by him between November 9, 1892, and October 2, 1894, and interest on such monthly premiums up to said last mentioned date, amounting in all to \$350, and that the true amount of defendant's indebtedness is \$650, with five per cent interest thereon from October 2, 1894; that prior to the beginning of this suit defendant offered to pay complainant the full sum so borrowed by him from said association, with five per cent interest after October 2, 1894, less the amount of the premiums paid by defendant, with interest thereon from the time they were paid, up to October 2, 1894, but said receiver always refused to accept any sum in settlement less than \$1,000, with interest thereon at five per cent from and after October 2, 1894. The answer then asks for an accounting, wherein defendant be charged with the sums borrowed, with six per cent interest from the dates upon which they were borrowed up to October 2, 1894, and that he may be credited with the monthly premiums of \$7.78, which were paid on the first loan of \$700, and with the monthly premiums of \$3.34 each, which were paid on the second loan of \$300, and five per cent thereon from the date of each of said payments, and with the interest paid on said loans up to October 2, 1894, and when such divers sums have been charged and credited to defendant, and the

VOL. 69.]Choisser v. Young.

balance due from him ascertained, that such balance be decreed to be the true amount due, and shall be received by complainant in full satisfaction of all defendant's former indebtedness to said association, and if such amount, when ascertained, be not greater than the amount tendered before the commencement of this suit by defendant to complainant, that this suit be dismissed and defendant be decreed to recover his costs.

This answer was held to be not sufficient in law or equity, to which ruling defendant then and there excepted. Defendant failed to plead or answer further, and the court found for complainant and against defendant, and that defendant is not entitled to have his indebtedness credited with any premiums paid by him, and that complainant is entitled to recover the full amount of money so borrowed by defendant, with five per cent interest thereon from October 2, 1894; that defendant was not in default in the payment of installments, or interest, or premiums, at the time said association went into the hands of the receiver, and that defendant is not liable for a solicitor's fee. The cause was referred to the master to take and report the proof and findings, and his report was filed and by the court approved.

The report finds upon the evidence submitted that all the material allegations of the bill are true; that the amount due complainant from defendant is \$1,000 principal, and interest at five per cent thereon from October 2, 1894, being the sum of \$73.25, and that complainant is entitled to have a receiver.

The court entered a final decree finding defendant's indebtedness to complainant to be the sum of \$1,073.25, appointing Miles K. Young receiver, and that said sum and costs be paid him.

DUNDAS & O'HAIR, attorneys for plaintiff in error.

KERRICK, SPENCER & BRACKEN, attorneys for defendant in error.

Choisser v. Young.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

From the foregoing statement it appears that the only defense relied on is, that the amount decreed to be paid by appellant is too much and ought to be reduced by deducting therefrom the premiums paid by him, and legal interest thereon, from the date of each payment up to October 2d, 1894. And it is insisted that "the manner in which the defendant was allowed to repay such borrowed money was a material and important part of the consideration for which such premium was bid," and the demand for the payment of the whole amount of the loan before the expiration of the time within which, had the association continued solvent, the payments monthly of interest, premiums and installments, together with the share of general profits, would make his ten shares worth \$1,000 and thus cancel the loan made to him, would be a breach of the contract, depriving the borrowing shareholder of a part of the consideration.

We do not think this an equitable defense in view of the admitted facts, and the answer setting it up was properly held to be insufficient.

Appellant became a stockholder and as such became a competitor with other stockholders to procure the loans. He was successful in his competition, because he bid a higher premium than any other stockholder would bid therefor, and this he was obliged to do in order to borrow the money. The amounts of the several loans were paid him out of the money then in the treasury of the association paid by the other stockholders, and the premiums he bid were not deducted from the amounts he borrowed. He was a stockholder who wished the matured value of his ten shares of stock to be advanced. To secure this privilege he was required to pay a premium. This premium, when paid in, increased the value of his ten shares of stock in common with all other shares, and had the association been successful, as all the shareholders hoped and expected, until the monthly payments made, consisting of installments, interest and premiums, would make his shares worth \$1,000, his

VOL. 69.]I. C. R. R. Co. v. Cozby.

stock would have been matured and would offset and cancel his loan, or advancement. But as a stockholder, appellant assumed, with other stockholders, all the risks incident to such relation, and when the association became insolvent he had no more right to withdraw from the assets premiums paid in by him, and thus decrease the assets in which every stockholder had an interest, than other stockholders had to withdraw the payments made by them of installments, interest and premiums. No guarantee was made to him that the association would continue doing business until his stock would become matured, and no promise of that kind can be assumed as a condition upon which he had paid the premium.

The master's report refusing to deduct the premiums from his debt was right, and the decree approving the same, and directing the payment of the amount so found due, was not erroneous. The case of *Towle v. American Bldg., Loan & Investment Society*, 61 Fed. Rep., 446, cited by appellee, is directly in point, and the views we have expressed and our decision of this case are in perfect accord with the opinion in that case.

The decree of the Circuit Court is affirmed.

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Illinois Central R. R. Co. v. Thomas C. Cozby, Adm'r.

1. **INSTRUCTIONS—*References to the Declaration.***—In an action on the case for personal injuries upon a declaration sufficient in law, it is proper to instruct the jury that if they believe from the evidence that the deceased was killed in manner and form as charged in the declaration, while in the exercise of due care and caution for his own safety, and engaged in the discharge of his duty to his employer as a switchman, they should find for the plaintiff and assess his damages, etc.

2. **SAME—*Not Shown by the Abstract.***—An instruction not shown by the abstract can not be considered by the court.

3. **EVIDENCE—*Of the Exercise of Ordinary Care.***—In the absence of direct and positive testimony, the fact that a deceased party was not guilty of negligence may be proved by reasonable inferences from his habits, and the circumstances surrounding him at the time of his death, as shown by the evidence.

I. C. R. R. Co. v. Cozby.

4. ORDINARY CARE—*How Shown in the Absence of Direct Testimony.*—In determining the question as to whether a deceased person was in the exercise of ordinary care at the time of an accident which resulted in his death, the jury may in the absence of direct testimony consider the fact, if shown by the evidence, that the deceased was bright, sober, zealous and careful, and that he was bound to life and to the exercise of care for its preservation by family ties, etc.

5. NEGLIGENCE—*Railroads—Construction of Track.*—It is negligence in the construction of its track by a railroad company to permit spaces between the ties to remain unfilled at places where there are no movable switches requiring such unfilled spaces.

6. HUSBAND AND WIFE—*Power of the Husband to Limit the Wife's Recovery by Contract.*—The value of the interest of the wife and children in the life of the husband and father, and the amount of their financial loss in case of his death, is fixed by the statute, and it is wholly beyond the power of the husband and father to alter or abridge their right of recovery by any contract which he may enter into.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Alexander County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 8, 1897.

WILLIAM H. GREEN, attorney for appellant.

WILLIAM N. BUTLER, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant urges that the court erred in giving appellee's first instruction. This instruction tells the jury that if they believe from the preponderance of the evidence that the deceased was killed in manner and form as charged in the declaration, while in the exercise of due care and caution for his own safety and engaged in the discharge of his duty to appellant as a switchman, then the jury should find for the plaintiff, and assess his damages at such an amount as the widow and heirs of the deceased had sustained.

It is said that this instruction does not make negligence on the part of appellant a prerequisite to recovery. But the instruction refers to the declaration, and the declaration sufficiently charges that the negligence of appellant was the

cause of Craiglow's death. But even if the instruction is not sufficiently definite in this particular, this lack of definiteness is more than compensated for by the numerous definite instructions given for appellant on this branch of the case. No one can read the whole charge to the jury without being made to understand that appellee could not recover except upon proof that appellant was negligent as charged in the declaration, and that this negligence was the proximate cause of the injury. Under the circumstances there was no error in giving this instruction to the jury.

The instruction to find for appellant is not in the abstract, and hence should not be considered under the repeated rulings of this court. However, as we must pass upon the evidence, the refusal to give the instruction must also be passed upon in effect; for, if the evidence is sufficient to sustain the verdict, the instruction should not have been given, and if the evidence is not sufficient the judgment must be reversed, in which case it makes but little difference whether the ground of reversal is that the verdict is against the evidence or that the instruction should have been given.

The field is now clear for the consideration of three propositions, urged with much ability on one side, and controverted with equal ability on the other, that is to say, that the deceased was not in the exercise of ordinary care when he was killed, that the defendant was not guilty of the negligence charged in the declaration, and that the contract between appellant and Craiglow is an effectual bar to an action for damages for the use of the widow and heirs.

First, as to the question of Craiglow's contributory negligence:

Craiglow was killed while endeavoring to uncouple cars which were moving at the rate of two or three miles an hour. There was no eye witness of what occurred while he was between the cars endeavoring to withdraw the link. Therefore, it is said, there is no proof, and there can be no proof, that Craiglow was in the exercise of ordinary care at the time of the injury.

It appears that one clause of the rules furnished Craiglow

I. C. R. R. Co. v. Cozby.

when he entered into the service of appellant warned him of the danger of coupling and uncoupling moving cars, and positively forbade such an act. The sentence immediately preceding this, however, authorized him to couple or uncouple moving cars if they were not moving at a dangerous rate of speed. In this and other respects, the rules are contradictory and misleading. If the switchman should be hurt, it could be said, "My dear sir, you were forbidden by the rules to uncouple moving cars." If, through excess of caution, he should stop every train before uncoupling cars and thus retard and embarrass business, it could be said: "The rules require you to uncouple moving cars when they are not moving at a dangerous rate of speed."

The evidence shows that it was the custom to couple and uncouple moving cars in the Cairo yards. This practice was certainly known to the railroad authorities, and was not discouraged by them, except in this contradictory manner on paper. It is manifest that in extensive yards, where much switching is to be done, the business of a railroad company could not be transacted, if every train was brought to a dead halt in order that cars might be coupled or uncoupled. We can not hold that Craiglow was necessarily guilty of negligence because he undertook to uncouple cars which were moving at the rate of two or three miles an hour.

The evidence shows that Craiglow was an experienced railroad man; that he was sober and temperate—very careful—possessed of all his faculties—an extraordinarily bright young man—zealous in his labors for his employer—anxious to protect himself. The evidence further shows that he had a wife and child, and that his wife was soon to become a mother again. He was earning ninety dollars a month at the time of his death.

In the face of these undisputed facts we are asked to hold that there was no evidence upon which the jury could base a finding that Craiglow was in the exercise of ordinary care when he was killed. The fact that he was bright, sober, zealous and very careful is to count for nothing. The fact

that he was bound to life, and to the exercise of care for the preservation of life, by the strong tie of love for wife and child is to be wholly ignored. It is to be presumed that he recklessly threw himself beneath this train of cars because, forsooth, no eye witness swears that he did not do so.

This is not the law. In the absence of direct and positive testimony on the subject, the fact that Craiglow was not negligent could be proved by reasonable inferences from his habits and the circumstances surrounding him as shown by the evidence. It was a question for the jury to decide, and with the decision of the jury we are satisfied. C., B. & Q. R. R. Co. v. Gregory, 58 Ill. 272; Missouri Furnace Co. v. Abend, 107 Id. 44; T. H. & I. R. R. Co. v. Voelker, 129 Id. 540; B. & O. S. W. Ry. Co. v. Then, 159 Id. 535.

Second, as to appellant's negligence:

Craiglow was killed in appellant's yards at Cairo, where there were many switchstands, and where there was much switching to be done. He had been working in these yards for about fifty days. But the yards were extensive, and repairing was constantly going on, and it was well nigh impossible for any switchman to keep himself fully informed as to the condition of the tracks at every point.

The accident occurred at what is called the "stub" end of a feather rail, which was fastened by a bolt to the tie so as to allow the other end of the rail to be moved for the purpose of transferring cars from one track to another. The spaces between the ties underneath this rail were unfilled, but this is excused on the ground that the rails with the connecting bridles could not be moved if the spaces were filled. Let this be granted, and yet the evidence is sufficient to establish the negligence charged in the declaration.

The evidence shows that for several feet north of the stub end of the feather rail, the spaces between the ties were unfilled to a depth of from two to six inches. Appellant's own evidence shows that a depth of three inches

I. C. R. R. Co. v. Cozby.

would be “bad railroading,” or, in other language, negligence. There was no movable switch, requiring unfilled spaces, immediately north of the rail in question.

The evidence justified the jury in finding that, while Craiglow was walking along between the cars of the moving train, using his best endeavors to withdraw a stubborn link, his foot was caught near the north end of the feather rail by reason of appellant’s negligence in leaving the spaces north of the feather rail unfilled, and that he was, as a consequence thereof, thrown upon the track and instantly killed. The finding of the jury does not depend solely upon the testimony of witnesses, but is fortified by what the jurors themselves saw while making an examination of the track at appellant’s request during the progress of the trial. *Stockton v. City of Chicago*, 136 Ill. 434; *C., B. & Q. R. R. Co. v. Burton*, 53 Ill. App. 69.

Third, as to the contract between appellant and Craiglow.

This contract refers to, and is based upon, the rules furnished Craiglow by appellant. Some of these rules are contradictory, as has already been shown. Some of them require what would be practically an impossibility without greatly hindering or embarrassing appellant’s business. Consider, for example the requirement that, before a switchman shall couple or uncouple cars, he must “examine and see that the cars or engines to be uncoupled or coupled, the pins, links, drawheads, and other appliances connected therewith, the ties, rails, tracks and road-bed, are in a good, safe condition, and that the cars are so loaded that such work may be safely done.” This requirement is absurd. Doubtless the railroad authorities did not expect that it would be literally observed. And the contract based upon these rules is broad enough in its terms to free appellant from liability for gross negligence, against which a common carrier is not permitted to contract under the decisions of the courts. *Arnold v. I. C. R. R. Co.*, 83 Ill. 273; *J. S. E. Ry. Co. v. Southworth*, 135 Id. 250.

But it is not necessary to rest the decision of this question upon the ground that such a contract is against public policy and therefore void. It is sufficient to say, upon the author-

VOL. 69.]

C., C., C. & St. L. Ry. Co. v. Bender.

ity of Naney v. C., B. & Q. R. R. Co., 49 Ill. App. 105, that the wife and child of the deceased had an interest in the continuation of his life which he could not take away from them by contract. The reasons for this rule of law are forcibly stated by Mr. Justice Boggs in the opinion in the Naney case, in which the right of the widow and children in cases like this is treated as a property right vested in them by the enactment of the legislature. "Neither argument nor authority," says the judge, "would seem to be necessary to sustain the view that the widow and next of kin can not be deprived of the property right so created and vested in them, at the will or pleasure or by the contract of another, though he be the party charged with the performance of duties out of which the right grew."

And again: "The value of the interest of his wife and children in his life, and the amount of their financial loss in case of his death, is limited by statute, and it was wholly beyond his power to further limit their right of recovery by any contract he might enter into."

If the husband can not limit the amount of the recovery, much less can he take away the right of recovery altogether.

We are satisfied with the verdict of the jury, and the judgment is hereby affirmed.

Cleveland, C., C. & St. L. Ry. Co. and St. Louis, M. B. T. Ry. Co. v. Herman Bender, Jr.

1. **RAILROADS—Joint Liability for Negligence of a Lessee Company.**—A railroad company using by agreement the road of another company, will be liable for damages resulting from its own negligence, and the owner company, to whom its charter gives the control and management of the road, will also be liable. (Penn. Co. v. Ellett, 132 Ill. 654.)

2. **EVIDENCE—Of the Contents of Ordinances.**—The testimony of a witness, that he had compared copies of ordinances sought to be introduced as evidence with the originals, and that they were true and correct copies of the originals, dispenses with the necessity of producing the originals and makes the copies of the ordinances original evidence without any certificate whatever.

3. **CROSS-EXAMINATION—Objections to Matters Brought Out on, on Appeal.**—If, on the cross-examination of a witness as to matters which

C., C., C. & St. L. Ry. Co. v. Bender.

were not properly the subject of cross-examination, it be shown that an ordinance had been duly passed and approved and was in force, the party drawing out such evidence is precluded from asserting on appeal that such parol proof was inadmissible or insufficient.

4. **REPEALS—Must be Shown Affirmatively.**—Where the evidence shows that an ordinance was in force on a certain day, the presumption, in the absence of evidence showing its repeal, is that it remains in force.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 3, 1897.

GEO. F. McNULTY, attorney for appellant C., C., C. & St. L. Ry. Co.; J. T. DYE, of counsel.

G. A. KOERNER, attorney for appellant St. Louis M. B. T. Ry. Co.

HADLEY & BURTON, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

North Market street, in the city of St. Louis, Missouri, is an important and much traveled thoroughfare, especially at those seasons of the year when Illinois farmers, crossing the Mississippi river on the ferry at Venice, haul their products to the markets of St. Louis. A few hundred feet from the river, the street is crossed by three railroad tracks belonging to the Wiggins Ferry Co., and a little farther west by two principal tracks belonging to the Belt road, and then by four tracks lying close together, the first two belonging to the St. Louis, Keokuk & Northwestern Railway, sometimes called the "K" or "Q" line, and the other two belonging to one of the appellants, the St. Louis Merchant's Bridge Terminal Railway Company.

The tracks of the last named company were used by certain passenger trains of the Wabash Railroad and of the C., C., C. & St. L. Ry. Co., and by certain other passenger trains between St. Louis and Granite City, Illinois. The same tracks were used daily by a great many freight trains. The extensive traffic over these tracks and on the street rendered this crossing an important and dangerous one.

At about seven o'clock on the evening of September 3, 1895, appellee was hauling a wagon load of watermelons west on North Market street, while just in front of him was his brother with another loaded wagon, and behind him was another man with a team and wagon. Their progress was arrested when they reached the "K" tracks by a Wabash train standing on the east of the two tracks belonging to the Terminal railway company.

Presently the Wabash train went north and the teamsters undertook to cross the tracks. The first team and wagon passed over safely, but the rear part of the wagon in which appellee was riding was struck by a passenger train coming from the north, which belonged to the C., C., C. & St. L. Ry. Co., one of the appellants herein.

There was no flagman at the crossing at the time to give warning of the approach of the train.

The evidence is conflicting as to whether or not the train was running at a greater rate of speed than six miles an hour.

The ordinances of St. Louis, if properly in evidence, required the keeping of a flagman at this point, and prohibited trains from running at a greater rate of speed than six miles an hour.

The jury were justified in finding appellants guilty of negligence on each of these grounds and in finding that appellee was himself in the exercise of ordinary care when he was hurt, and that the negligence of appellants was the proximate cause of the injury.

But it is said that the two appellants could not be jointly liable—that one did not own the tracks and could not be held liable for not keeping a flagman at the crossing, and that the other did not own or operate the train and could not be held liable for the unlawful speed of the train.

That this is not the law, is shown by Pennsylvania Co. v. Eilett, 132 Ill. 654, and the authorities there cited.

It is also urged that the court erred in admitting certain ordinances of the city of St. Louis in evidence.

Ordinance 10,061 prohibits any person or corporation from running any cars propelled by steam in the city of St. Louis

C., C., C. & St. L. Ry. Co. v. Bender.

across any improved street within the city limits without keeping a flagman at each crossing of such street, who shall give warning of danger by a red flag in the day time and by a red light in the night time.

Ordinance 10,305 prohibits the running of any locomotive or cars propelled by steam within the city at a rate of speed exceeding six miles an hour, with an exception which has no bearing upon this case.

When these ordinances were offered in evidence counsel for appellants objected, on the ground that the ordinances were not properly proved. Thereupon C. H. Burton was sworn and testified that he had compared the copies with the originals on file in the city register's office at St. Louis, and that they were true and correct copies of the originals; that sections 1263 and 1267, article 5, of the revised ordinances of 1893, are true and perfect copies respectively of ordinances 10,061 and 10,305; that the copy of section 1238 of ordinance 17,189 is a true copy of the original.

This testimony, which is not modified by cross-examination or contradicted by other evidence, dispenses with the necessity of producing the originals and makes the copies of the ordinances original evidence without any certificates whatever. Sections 14 and 18 of Chap. 51 of the Ill. Stat.; L., N. A. & C. Ry. Co. v. Shires, 108 Ill. 617; Mandel v. Swan Land Co., 154 Id. 177.

The question now arises whether or not the evidence shows that the ordinances in question had been duly passed and were in force at the time when appellee received his injuries.

The statutes of Missouri, which were introduced in evidence by appellants, show that as soon as an ordinance is approved by the mayor of St. Louis it becomes a law. No publication of such an ordinance is required, and therefore no publication need be proved.

The question is now very much simplified, and is no more than this: Were the ordinances duly passed and approved?

In L., N. A. & C. Ry. Co. v. Shires, above cited, the passage of an ordinance of a city in a foreign State was proved by the deposition of a witness who swore that the ordinance was "passed by the common council" of the city. Only a

VOL. 69.] C., C., C. & St. L. Ry. Co. v. Bender.

general objection was made to this part of the deposition and the deposition remained on file for two months before the trial without any motion to suppress, and it was held to be too late to object on the trial that the passage of the ordinance could not be shown by parol.

By a similar process of reasoning, it is clear that if appellants in this case, on cross-examination of the witness Burton, as to matters which had not been touched upon in chief and were not properly the subject of cross-examination, proved by the witness that the ordinances had been duly passed and approved and were in force at the time of the accident, appellants are precluded from asserting here that such parol proof was inadmissible or insufficient.

The examination of Burton in chief related solely to the question whether or not the alleged copies were true copies of the original ordinances. When counsel for appellant went beyond this question and examined the witness as to the passage and approval of the ordinances, they made him their witness as to these matters, and will not be heard to say that the evidence thus brought into the record by them is not the best evidence to show the facts thus established.

Appellants proved by a cross-examination of Burton that in St. Louis the ordinances are printed before they are passed, and that after they have been duly passed and approved, they are deposited in the city register's office; also that sections 1263 and 1267 of the revised ordinances of 1893, as found in the city register's office, purport to be signed by the president and clerk of the council and by the same officers of the house of delegates, and to be approved and signed by the mayor.

Moreover, the witness swears directly on cross-examination that the ordinances were passed, and the cross-examiner, speaking to the witness of the signatures of the president and clerk of the council to one of the ordinances, says: "That shows their passage in one house."

If this is correct, then the signatures of the president and clerk of each house, and the approval of the mayor to the revised ordinances ought to be sufficient to show that the ordinances have been duly passed.

C., C., C. & St. L. Ry. Co. v. Bender.

In addition to the foregoing evidence, appellee produced in evidence the certificates of the city register, H. J. Pocock, under his hand and the seal of the city, showing that ordinances 10,061 and 10,305 are true copies of the originals, and that he is the custodian thereof, and that these ordinances are the originals of sections 1263 and 1267 of article 5, of the revised ordinances of 1893. Appellee also offered in evidence the certificate of the secretary of the State of Missouri, under his hand and the great seal of the State of Missouri showing that said Pocock is the legal custodian of the ordinances duly passed, and which have become laws in and for the city of St. Louis, and that the attestations of Pocock above mentioned are in due form and properly certified by him, as required by the laws of Missouri, and that the attestations and certificates are by the proper officers.

The proposition that it does not appear that the city of St. Louis had power to pass ordinances 10,061 and 10,305 when they were passed, even if sustained by the record, does not affect the decision of this case, for the city certainly had ample power to pass the ordinances when they were embodied in the revised ordinances of 1893.

Nor is there any merit in the proposition that the evidence does not show that the ordinances were in force on the day of the accident. Where the evidence shows that an ordinance was in force on a certain day, the presumption, in the absence of evidence showing its repeal, is that it remains in force. *St. L. & T. H. R. R. Co. v. Eggman*, 60 Ill. App. 291.

Upon careful examination of the record in this case, we are satisfied that the ordinances were properly admitted in evidence.

No other question of any importance has been pressed upon our attention. The instructions for appellants were fully as favorable as the law would warrant. It is not claimed that the damages—\$800—are excessive. The court did not err in refusing to require the jury to specify in their verdict under which count or counts they found appellants guilty. The judgment is affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1896.

American National Bank v. The Western Hay and Grain Co., for the use of C. M. Ewan.

1. NEGOTIABLE PAPER—*Failure of Consideration Between Drawer and Drawee as Affecting Payee.*—If the payee of a bill of exchange gives value to the drawer, and is in ignorance of a want or failure of consideration as between the drawer and the drawee, such want or failure of consideration can not be set up against him by the drawee after payment or acceptance.

Attachment and garnishment. Appeal from the City Court of Canton: the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 4, 1896.

GRANT & CHIPERFIELD, attorneys for appellant.

ABBOTT & WORLEY and P. W. GALLAGHER, attorneys for

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
It appears from this record that C. M. Ewan, residing at Canton, Illinois, ordered of the Western Hay and Grain Co., of Kansas City, Mo., a car load of No. 1 timothy hay. Thereupon said company shipped him a car load of hay, and drew upon him for the price, \$127.93.

American Nat. Bank v. Western Hay and Grain Co.

The draft was payable at sight in favor of the appellant bank and was accompanied by a bill of lading for the hay.

The appellant discounted the draft, paying the drawer the face thereof less the discount, and transmitted it, with the bill of lading attached, to the First National Bank of Canton for collection. The hay having reached Canton, and Ewan being unable to obtain or examine it without payment, paid the draft to the last named bank.

A part of the hay, being taken to his place of business, was found to be unfit for use, and such proved to be the condition of the entire lot. For this cause he returned what he had so received to the car, and immediately brought an attachment against the Western Hay and Grain Co., and caused the Canton Bank to be summoned as a garnishee. The appellant bank interpleaded, claiming the money which was still in the possession of the Canton Bank. A trial by the court of this issue, a jury being waived, resulted in a finding and judgment for the plaintiff for said sum of \$127.93. Appellant brings the record here and asks a reversal.

The attachment suit by Ewan against the Western Hay and Grain Company was to recover damages by reason of a breach of contract, and the garnishment of the Canton Bank was for the purpose of reaching money belonging to the attachment defendant as alleged. In such cases if the garnishee is held, the judgment is in favor of attachment defendant for the use of the plaintiff and against the garnishee.

It is, of course, essential that the garnishee owes the attachment debtor, or has possession of property belonging to him. Third parties claiming the subject-matter garnished may interplead and assert any interest they have therein and may appeal from an adverse decision.

The question here is whether the money held by the Canton Bank belonged to the Western Hay and Grain Co. or to the appellant bank.

The evidence is uncontradicted that the latter paid the former the face of the draft, less the usual discount in the

VOL. 69.] American Nat. Bank v. Western Hay and Grain Co.

usual course of business, and had no knowledge of any want of consideration as between the drawer and the drawee.

The bill of lading being attached gave the payee a lien upon the hay, but no notice of the defense is to be inferred from this fact. When the money was paid to the Canton Bank, it belonged to the appellant, unless the circumstances in proof can operate to a different result.

Appellee argues that the payee of the bill of exchange is chargeable with a want of consideration as between the drawer and the drawee—that though the latter accepts the bill, he may excuse himself from paying it upon the ground of a want or failure of consideration afterward ascertained, and that if he has paid it under a mistake of fact and without consideration he may recover the money back from the payee, and in such case the money is to be treated as not belonging to the payee, but in this instance as subject to garnishment in the attachment proceeding against the drawer. Without conceding that the conclusion would necessarily follow the premise, let us inquire whether the premise is correct. Reference is made by counsel to Story on Bills, Sec. 187, where the general rule is announced that the want or failure of consideration may be insisted on as a defense or bar as between any of the immediate or original parties to the contract, and the author in the next sentence states instances where the defense may be made as by the drawer against the drawee, by the payee against his indorser, and by the acceptor against the drawer, but does not give the case of acceptor and payee.

In Daniel on Negotiable Instruments, Sec. 174, it is said that, as between the immediate parties to a bill, a want of consideration may be shown, but as between other parties remote to each other the defense is not admissible, and therefore it becomes important to determine who are immediate and who are remote parties, and proceeds to say that the drawer and acceptor, the drawer and payee, and the indorser and his indorsee of a bill are immediate parties, but that the payee and acceptor are as a general rule remote parties, between whom a want of consideration to

American Nat. Bank v. Western Hay and Grain Co.

the acceptor is not a sufficient defense. In such case it must also be shown that the payee is not a *bona fide* holder for value. To the same effect is Tiedeman on Commercial Paper, Sec. 154; Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411; Hoffman v. Bank of Milwaukee, 12 Wallace, 181. In the latter case a consignor, who had been in the habit of drawing bills of exchange on his consignee with the bills of lading attached; drew on him certain such bills with forged bills of lading attached, and discounted the drafts in the ordinary course of business with a bank which was ignorant of the fraud. The consignee, not knowing that the bills of lading were forged, paid the drafts, and afterward on discovery of the fraud sued the bank, but it was held that he had no recourse on the bank. The court said that as between remote parties to a bill, as for example, the payee and acceptor, a want of consideration as between the latter and the drawer is not a defense; that where the payee acquires the bill before due and without notice two considerations are involved; first, that which defendant received for his liability; and second, that which the plaintiff gave for his title, and held the rule to be well settled that between the remote parties to the bill the action will not be defeated unless there be an absence or failure of both of these considerations. And so the court ruled that the plaintiff could not recover back the money on the ground that it had been paid without consideration and by mistake of fact, for in such case there was neither mistake nor want of consideration in contemplation of law.

In the case at bar, the attaching plaintiff could not have recovered back the money so paid by him to the bank.

Had the draft been payable at a future day and accepted by him in ignorance of his defense, he could not have pleaded such want of consideration in an action on his acceptance.

Such defense might prevail if supplemented by a want of consideration, as between the drawer and payee; that is, that the latter gave nothing for the bill and therefore had no title thereto as against the acceptor.

In such case perhaps the law might regard the payee as merely the agent of the drawer, and the money, though paid on the draft, as really belonging to the latter. Very clearly, however, that is not the case as made by the proof in this instance.

We are of opinion the judgment against the garnishee is erroneous. It will therefore be reversed and the cause remanded.

Arthur Robley v. J. J. Culwell.

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1. STATUTORY PENALTIES—*Debt the Appropriate Action.*—Debt is the appropriate action for the recovery of a penalty provided by statute.

2. CHATTEL MORTGAGES—*Sale Under, Act of 1895.*—The purpose of the act of June 21, 1895, is to secure to the mortgagor, whose property has been sold under a chattel mortgage, full information as to the sale, the amount received for each article, and the expenses of the sale, etc.

3. SAME—*When the Act of 1895 Does Not Apply.*—When the validity of a sale under a chattel mortgage is denied, and the mortgagor held to account as a trespasser, the act of June 21, 1895, relating to sales under chattel mortgages, does not apply.

TRESPASS.—Appeal from the Circuit Court of Greene County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 4, 1896.

STATEMENT OF THE CASE.

Appellant, under the claim he was authorized so to do by the provisions of a chattel mortgage, executed to him by appellee, seized and sold the mortgaged property.

Appellee denied that default had been made in the conditions of the mortgage or that the contingencies had occurred which, under its provisions, authorized seizure and sale of the property, and brought trespass to recover the damages for the alleged wrongful seizure and sale of the property.

The verdict of the jury was for appellee in the sum of \$450.

Appellant moved for a new trial and assigned as one of

Robley v. Culwell.

the grounds of the motion the giving of the following instruction in behalf of appellee:

“ 1. If you find that said property embraced in said chattel mortgage was improperly and unlawfully taken and sold on the 13th day of July, 1895; and if you find from the evidence that the mortgagee did not make out a statement showing the items of property sold, the names of each purchaser, and the amount for which each article sold, and also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling said property, and did not deliver the same to the mortgagor, in person or by mail; and if you find that the said Arthur Robley, the mortgagee, failed within ten days after said sale to make out said statement above mentioned and deliver the same to the mortgagor, in person or by mail, then you are instructed that the said mortgagor, the plaintiff in this action, is entitled to recover one-third of the value of the property so sold from the defendant; and under this state of facts, it makes no difference whether any of the causes enumerated in the chattel mortgage for foreclosing the same existed or not at the time the same was foreclosed and sold.”

It was conceded the averments of the declaration were insufficient to warrant the recovery of the statutory penalty imposed under this instruction, and leave was granted appellee to add an additional count to the declaration, which was done. Thereupon the court overruled the motion for a new trial and entered judgment upon the verdict.

The count so added to the declaration charged that the appellant with force and arms seized the property as mortgagee, sold it but did not deliver to the appellee, the mortgagor, a statement of the articles of property so sold, the purchasers thereof, the expenses of the sale, as required by the provisions of Sec. 2 of the act of the General Assembly approved June 21, 1895, entitled, An act to * * * regulate the sale of property under chattel mortgages. Myers' R. S. 1895, Chap. 5, Sec. 24.

J. B. NULTON, attorney for appellant.

HENRY T. RAINES, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Debt is the appropriate action for the recovery of a penalty provided by statute.

Here the action was trespass, and a count in debt for the penalty could not properly be added.

The purpose of this act of 1895, here sought to be invoked, was to secure to the mortgagor, whose property has been sold under a chattel mortgage, full information as to the sale, the amount received for each article, and the expenses of the sale, etc.

It presupposes a legal sale, and its design is to secure to the mortgagor the full benefit of such a sale by investing him with a knowledge of the facts in detail.

Here the validity of the sale was denied, and the sale was overthrown and the mortgagee held to account as a trespasser.

Hence the statute in question had no application. It was error to give the instruction set forth in the statement of the case, and the amendment to the declaration should not have been allowed.

The judgment is reversed and the cause remanded.

Lake Erie & Western R. R. Co. v. Martin Murray.

1. EVIDENCE—*Of the Sufficiency of Cattle-Guards.*—In a suit against a railroad company based on its alleged failure to maintain proper cattle-guards, it is proper to permit witnesses for the plaintiff to testify that they had seen horses pass freely over cattle-guards of the same construction, in use in the same vicinity, the circumstances being similar; and witnesses for the defendant to testify that the same make of cattle-guard was in general use among first-class railroads, and was regarded as being the best known device for the purpose, and such testimony should be considered by the jury in connection with any other evidence touching upon whether the guards were suitable and sufficient.

L. E. & W. R. R. Co. v. Murray.

Trespass on the Case, for killing horses. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 4, 1896.

A. E. DEMANGE and H. W. HALL, attorneys for appellant; W. E. HACKEDORN and JOHN B. COCKRUM, of counsel.

J. J. MORRISSEY and THOMPSON & DONAHUE, for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Judgment below for appellee, for the value of two horses, struck and killed by appellant's train, and for attorney fees.

The ground of recovery was the alleged failure of the company to provide a suitable and sufficient cattle-guard.

The guard was of a particular make known as "The steel surface cattle-guard."

The evidence questioned the sufficiency of the guard in point of plan and construction, and tended to show the slats of which the guard was composed were too close to the ground, and that weeds and grass had been allowed to grow between the slats of the guard in question.

Whether the guard was suitable and sufficient to turn horses was a question of fact. It is beyond question the horses passed over it, and consideration of the testimony bearing upon the contention has led us to the conclusion we are not warranted to say the decision of the jury, that the guard was not suitable and sufficient to have prevented such passage, was manifestly wrong.

No reason appears to ascribe the verdict to passion, prejudice or mistake.

The judgment must therefore be affirmed, unless error occurred in rulings of the court.

Counsel for appellant asked appellee the following question:

Q. How often had your horses been out in the highway? And to another witness propounded the following question:

Q. What places have you ever seen this black horse?

The court sustained objection to each question and appellant saved exceptions.

Counsel in their brief say the answers were intended to develop that the horses were frequently in the highway, and that from that fact insist the inference arises the animals were breachy, and would not be restrained by a "suitable" and sufficient cattle-guard.

Had answers of the most favorable kind been made to the questions, nothing would have been furnished other than the basis for the merest conjecture. If error was committed, which we do not conceive, it was altogether too unimportant to demand reversal, especially in view of the fact the subject was not further developed by any other testimony.

It was not improper to permit witnesses to testify they had seen horses pass freely over cattle-guards of the same make and construction in use on appellant's road in the same vicinity, the circumstances not being dissimilar. L. E. & W. R. R. Co. vs. Helmerick 38 Ill. 141.

Such testimony tended to prove cattle-guards of that type and plan of construction insufficient or unsuitable for the purpose.

It was proper for the appellant company to prove the "steel surface cattle-guard" was in general use among first-class railroads, "and regarded as being the best known device for that purpose," as tending to support its contention that the cattle-guard in question was suitable and sufficient to turn horses.

The statute required the appellant company to make the guard suitable and sufficient to prevent * * * horses * * * from getting on the railroad.

The duty thus imposed upon the company by the statute is not to be absolutely measured by what it or other roads had done in the way of selecting and adopting devices of any kind as being the best wherewith to meet the demand of the statute.

That the device adopted was in general use by railroads

City of Springfield v. Coe.

as the best known, was proper for consideration as tending to show it was sufficient and suitable for the purpose, but did not constitute a complete defense within itself.

It remained a question of fact, to be determined from all the testimony touching upon it, whether the guard was suitable and sufficient.

The instructions given for appellee were framed in accordance with this theory and in that respect are approved.

The complaint that instructions for the plaintiff imposed upon appellant company the duty of having guards sufficient to turn all horses, without regard to the question whether the particular animals were extraordinarily breachy or wild from fright, need not be further noticed than to remark the testimony in the case did not tend to show the horses were frightened at the time, or were more breachy than ordinary stock.

The substantial controversy in the whole case was of fact, whether the guard in its then condition was suitable and sufficient to turn horses.

There appears no reason the determination of the jury of that question should not be accepted by this court.

The judgment is affirmed.

City of Springfield v. Martha Coe.

69	277
166s	22

1. **NEGLIGENCE—Traveling on a Defective Street.**—The fact that a plaintiff suing for injuries received on a defective street had knowledge of the defects is proper for consideration by the jury in arriving at a conclusion upon the question whether he acted with due care, but it is not, as a matter of law, proof of negligence.

2. **SAME—Knowledge of Defects in a Street.**—The mere fact that a plaintiff suing for injuries received on a defective street, though in possession of knowledge of the defects, was not at the time thinking of the condition of the street, does not necessarily bar a recovery, but may be considered, together with the other circumstances in proof, in deciding whether the plaintiff used ordinary care to avoid injury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, pre-

VOL. 69.]City of Springfield v. Coe.

siding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 4, 1896.

E. S. ROBINSON, city attorney, for appellant; J. C. SNIGG and E. L. CHAPIN, of counsel.

PATTON, HAMILTON & PATTON, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

In order to make contemplated repairs on Fourth street the appellant city caused the material with which the street was paved to be removed, which left the surface of the street some fifteen inches lower than it had formerly been at the point of intersection of Fourth and Canedy street.

The street was in that condition during the night of September 23, 1895. At about the hour of eight o'clock of that night appellee, a lady somewhat advanced in years, accompanied by her daughter, a young lady, alighted from the street cars at the corner of Fifth and Canedy streets, and started to walk westward along the walk on the south side of the last named street to their home, at the southwest corner of Fourth and Canedy streets. The night was dark and there was no street lamps or other light.

They reached Fourth street, and with the view of crossing it, stepped from the curbing and because of the excavation made in the streets by the city as before mentioned, the appellee received a violent fall.

One of the bones of her right arm was broken, the bones of the wrist of her hand dislocated, the ligaments and tendons of the arm and hand lacerated and torn, her shoulder strained, and bruises were inflicted on other parts of her body. She recovered judgment in the sum of \$2,000 and the city appealed.

As a ground for reversal, it is urged appellee failed to exercise ordinary care, and that her negligence contributed materially to her injury and precluded recovery.

In connection with this insistence it is proper to notice

City of Springfield v. Coe.

an alleged error of the court in ruling upon the admissibility of testimony.

Counsel for appellee asked her the following question:

"Q. Now, when you went along, what kind of care did you exercise, you and your daughter, going along the sidewalk on the street at that point, if any?

Objected to by defendant. Objection overruled by the court; to which ruling the defendant, by its counsel, then and there excepted.

A. Well, we tried to be very careful.

Objection by the defendant.

A. I do not know; it was dark, and we were afraid all the time and we walked carefully. I was afraid of falling because it was so dark; that is why I took hold of my daughter's arm. I said I could not see anything, and was afraid I would fall."

In answer to questions propounded by counsel for the city, on cross-examination, the appellee stated with minuteness of detail the manner in which she and her daughter were walking, and all that took place just before and at the time she received her injuries.

The instructions, of which no complaint is made, were such the jury could not but understand they were to determine whether appellee had used ordinary care, by the application of their judgment to the facts and circumstances proven.

The answer of appellee, if regarded as an expression of opinion merely, and as such not competent to be received in evidence, can not in reason be deemed of sufficient importance to demand a reversal of the judgment. Stirling Bridge Co. v. Pearl, 80 Ill. 251.

Appellee had knowledge, at least in a general way, of the work that the city was having done on the street.

The fact she had such knowledge was proper for consideration by the jury in arriving at a conclusion upon the question whether she acted with due care, but it was not evidence of negligence as matter of law.

It was for the jury to determine, as matter of fact in view of all the testimony bearing upon the question, whether she

VOL. 69.] Missionary Society of the M. E. Church v. Cadwell.

exercised ordinary care. City of Sandwich v. Dolan, 141 Ill. 430; Village of Cullom v. Justice. 161 Ill. 372.

The fact that though in possession of such knowledge she was not at the time thinking of the condition of the street did not necessarily bar recovery. Her admissions upon this point were proper for consideration, together with all the circumstances in proof, in arriving at a conclusion upon the ultimate question whether she used ordinary care and prudence. City of Springfield v. Rosenmeyer, 52 Ill. App. 301.

The appellee's case does not fall in the class of those referred to by Mr. Justice Scholfield in C., M. & St. P. R. R. Co. v. Halsey, 33 Ill. 254, who "permit themselves to become absorbed in thoughts about other matters and in consequence oblivious to present surroundings."

Her surroundings at the time were a source of concern to her. She was not absorbed in thought about other matters and oblivious to things about her, but was anxious and uneasy because of the situation, and in the midst of her apprehensions momentarily forgot one source of danger. This was proper for consideration upon the question of the degree of care used, but not conclusive.

The injuries received by the appellee were quite serious and painful, possibly, if not probably, permanent in character. It is not manifest but that the evidence warranted the belief the chances for permanent recovery were slight.

Damages in such a case must be committed largely to the sound discretion of a jury. We do not feel warranted in declaring the discretion thus vested in the jury was unreasonably exercised in this case.

The judgment is affirmed.

Missionary Society of the M. E. Church v. Adison Cadwell et al., Executors.

1. **WILLS—Construction of. Mistake in the Name of a Legatee.**—A mistake in the name or description of a legatee, whether an individual or corporation, will not render a bequest void if the name and description used in the will, as applied to the facts and circumstances, will

Missionary Society of the M. E. Church v. Cadwell.

identify such person or corporation from others, and whenever parol evidence becomes necessary to remove such uncertainty the court may inquire into any material facts relating to the person who claims under the will, for the purpose of identifying the person intended.

2. *SAME—Parol Evidence Admissible to Identify Legatee.*—Where a legatee is named in a will, and there is no legatee of that exact name, parol evidence is admissible to show what person or society was intended by the testator.

3. *MISNOMER.—In Name of a Legatee.*—A misnomer in a will, designating the organization intended to be benefited by a legacy will not defeat the bequest if it can be reasonably shown what society in fact was contemplated by the testator.

Bill for the Construction of a Will.—Appeal from the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge presiding. Heard in this court at the May term, 1896. Reversed and remanded, with directions. Opinion filed December 4, 1896.

A. G. CRAWFORD, attorney for appellant.

A. C. BENTLEY, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery filed by the executors of Lucy Williams, deceased, to obtain a construction of her last will. The clause now to be considered made a bequest of \$1,500 to "The Home Missionary Society of the M. E. Church," but as there was no society or corporation organized under that precise name, and as two organizations, to wit: "The Missionary Society of the M. E. Church" and "The Woman's Home Missionary Society of the M. E. Church," were each claiming to have been intended by the testatrix, the executors sought the direction of the court of chancery in that behalf. These claimants were made parties, and after a full hearing the court entered a decree finding that "The Woman's Home Missionary Society of the M. E. Church" was the organization intended in the will. "The Missionary Society of the M. E. Church" brings the record here and asks a reversal of the decree.

It appears from the evidence that the testatrix, a maiden lady of considerable estate, had for many years been a mem-

VOL. 69.] Missionary Society of the M. E. Church v. Cadwell.

ber of the Methodist Episcopal Church at Pittsfield, Illinois; that she took a very active interest in its work, was zealous and liberal and well versed in all matters pertaining to the affairs of the church in general.

It also appears that in connection with and under the auspices of that church there are three missionary societies—one known as "The Missionary Society of the M. E. Church," one known as "The Woman's Foreign Missionary Society of the M. E. Church," and one known as "The Woman's Home Missionary Society of the M. E. Church."

The first named is the general missionary organization of the church. In its charter granted by the State of New York it is declared :

"The objects of said organization are charitable and religious. It is designed to diffuse more generally the blessings of education and Christianity and to promote and support missionary schools and Christian missions throughout the United States, and Territories, and also in foreign countries." It is managed by a board composed of ministers and laymen according to rules and regulations prescribed by the general conference of the M. E. Church. Its scope is general both as to the field of operations and as to the subjects of its consideration. About fifty-five per cent of its funds are expended abroad and about forty-five at home. The second has for its object the more successful prosecution of the missionary work of the church among women in foreign lands. The general purpose of the third is to enlist and organize the efforts of Christian women in behalf of the needy and destitute women and children of all sections of this country without distinction of race and to co-operate with other societies of the church in educational and missionary work. It has authority to collect and disburse money, employ missionaries, and to work among such neglected population in the home field.

The testatrix was a person of unusual intelligence and energy, and very familiar with the missionary operations of the church. She was never connected with either of these societies, and, as some of the witnesses think, was not very

Missionary Society of the M. E. Church v. Cadwell.

much in favor of "women's movements in the church separate from the general work of the church," and it appears that though there was a branch of The Woman's Home Missionary Society organized in the town where she lived she did not belong to it, nor contribute to it, though always giving liberally to the general missionary society of the church. The latter society as already stated was devoted to foreign as well as domestic missions, and while it had no separate departments for these missions it used approximately a certain per cent of its funds for each, and, as the testimony shows, where a gift or devise is made specially for home or foreign purposes, it will be applied according to the wish of the donor. If a gift is without limitation the money will be placed in the treasury and used as other funds, under the direction of the board, for both home and foreign missions in about the proportions stated.

There is evidence that the testatrix was not favorable to foreign mission work, and never belonged to the woman's foreign missionary society; and on the other hand that she did belong to it for a short time some eighteen years before her death.

It appears that in the early history of the church in her town the general missionary society, at her solicitation, rendered some pecuniary aid which was much needed, and which she then, and ever after, seemed to appreciate fully, and that she often expressed herself to that effect—that her brother, who died several years before she made her will, entertained similar feelings and requested her to remember the missionary society of the church liberally, and that in referring to this request on one occasion she said she intended to do so.

As already stated, it appears that she always did give liberally to that society while she lived.

There is testimony to the effect that among members of the church that society was usually known as "The Missionary Society," and very often was spoken of as the "Parent Board," and that "The Woman's Home Missionary Society" was usually designated as The Home Missionary

VOL. 69.] Missionary Society of the M. E. Church v. Cadwell.

Society; though it is quite apparent that such testimony seems to be very largely a reflex of the habit and idea of the witness, rather than a statement of any general or invariable custom or understanding among Methodists in the use or precise meaning of these designations.

Very probably if in the same discourse there was reference to "The Missionary Society," and also to "The Home Missionary Society," the speaker would have intended (and the audience would have understood) "The Missionary Society of the M. E. Church," and "The Woman's Missionary Society of the M. E. Church," and probably the same would have been the case in an ordinary conversation where both societies were so referred to.

In *Missionary Society v. Mead et al.*, 131 Ill., page 361, it is said that a mistake in the name or description of a legatee, whether an individual or corporation, will never render a bequest void if the name and description used in the will, as applied to the facts and circumstances proved, will identify such person or corporation from others; and that whenever parol evidence becomes necessary to remove such uncertainty the court may inquire into any material fact relating to the person who claims under the will, to the property claimed as the subject of disposition, to the circumstances of the testator and his family and affairs, for the purpose of enabling the court to identify the person intended by the testator—that the law is not so unreasonable as to deny to the reader of an instrument the same light which the writer enjoyed, and that the court should, by means of extrinsic evidence, place itself in the situation of the testator, whose language it is called upon to declare.

The court further remarks :

"Under this rule, it was unquestionably competent for these various claimants to prove their corporate existence and the objects and purposes for which they were organized; the knowledge, if any, which testatrix had of them, and her feelings toward and relations with them; the name or names by which she or others were accustomed to designate them; that no other corporations, associations or societies

Missionary Society of the M. E. Church v. Cadwell.

corresponding to the name or description given in the will existed at the time it was executed; her family, church and social relations; in short, every fact and circumstance surrounding her and these claimants, which would aid the court in reaching a conclusion as to her motives and purposes in using the names or description in question."

After referring to a number of adjudged cases illustrating the view expressed, the court quoted from Hinckley v. Thatcher, 139 Mass. 477, as follows:

"The facts known to the testator at the time he executed his will, the names by which he was accustomed to call the missionary societies, or by which they were usually called and known in the religious society with which he worshiped, the interest shown by him in any particular missionary society, and the contributions, if any, that he made for missionary purposes, are competent evidence to aid in identifying the missionary societies intended by the will."

The bequest is to "The Home Missionary Society of the M. E. Church." The word *Home* being omitted the name of appellant would remain. The word *Woman's* being interpolated would give us the name of appellee claimant.

Manifestly the gift was intended for one of these claimants.

The appellant is, as already stated, the general missionary agency of the church. It is designed to diffuse more generally the blessings of education and Christianity, and to promote and support missionary schools and Christian missions throughout the United States and Territories, and also in foreign countries. It is not restricted as to the objects or locality of its benefactions, and is the main instrumentality through which these functions of the church are performed.

It derives a large part of its funds from contributions regularly taken up in the various charges, and those funds are disbursed by the board in nearly equal proportions for domestic and foreign missions—though a contribution will be used exclusively for either as may be desired by the donor.

The appellee claimant has a limited field and object. Its main dependence is upon the efforts of Christian women, and

VOL. 69.] Missionary Society of the M. E. Church v. Cadwell.

its great charity is in behalf of needy and destitute women and children in this country.

The one is general, embracing all the appropriate means by which religious and educational advantages may be secured to all people in this and foreign lands, the other is specially intended to aid needy and destitute women and children in the home field.

The testatrix, with her intelligent knowledge of the customs and methods of the church, seemed to have a broad view of what was most useful and practical in working out its great purposes.

She thought the home missionary work was most fruitful of good results when directed to the support and building up of weak and struggling charges, such as was that of her own town years ago, as already stated—she was especially interested in such efforts. She did not feel so much interest in foreign missions; nor did she contribute to the appellee claimant in its home mission work but declined to do so, though giving freely at all times to the appellant, and this, as we may fairly presume, because in her judgment one was more practically useful than the other. Evidently that was her idea. She knew that if she gave to the appellant for home use the gift would be devoted to those forms of mission work which she preferred, and if she gave to the appellee claimant it would be devoted to special objects, and through special efforts which she had not preferred.

Counsel for appellee say she had more than ordinary business ability; that she looked after her affairs herself, and that she wrote the will with her own hand.

We do not find any proof of this latter statement in the abstract. The instrument is quite aptly drawn, yet it is a little singular that she should have failed to designate more accurately the beneficiary intended in this bequest. In one other instance she was also at fault; that is in giving a sum to the University of Bloomington, Illinois, there being no institution of that name, but as was alleged in the bill, this was designed for an institution of learning under the aus-

Missionary Society of the M. E. Church v. Cadwell.

pices of her church at Bloomington, known as "The Illinois Wesleyan University." Perhaps and probably this was characteristic of her, as it is of many persons having enlarged ideas with an active, executive disposition, who are not careful or particular as to merely technical details. She knew well enough there was no organization bearing the precise name mentioned in this bequest, and yet it did not occur to her that there would be any doubt as to the beneficiary intended.

The whole matter being considered, we feel reasonably certain that she meant to give her money to the home missionary cause of her church, in the broadest sense, as she had always done, to be used and expended through the main, general, and most efficient agency of the church for such purposes, and that it was not her design to give it to the "Woman's Home Missionary Society."

It is not to be supposed that because she was a woman she would favor by her will that organization. On the contrary, she never seemed so inclined, and, as is well known, many women of the highest intelligence and the best judgment do not choose to co-operate with organizations controlled exclusively by or in the interest of women.

Nothing can fairly be drawn from this consideration one way or the other except so far as it may be affected by evidence bearing directly upon it. We are persuaded that she considered her bequest effective, and that she so intended it in favor of the general missionary society of the church, for use in the home field, and that the word *Home* was employed merely for the purpose of designating where the money was to be applied. This was the only word of limitation that she used.

If we interpolate the word *Woman's*, as urged by appellee claimant, we must add another limitation and thus effectuate an object which she in her life did not appear to regard with much interest, though it was often pressed upon her notice by those who were promoting it.

She was a person of mature and settled views, and it is not likely that at the close of a long, active and consistent life, when making a final disposition of her estate, mainly to

charitable objects, she would depart from a course she had usually pursued or abandon ideas that she had always entertained.

We are of opinion the decree erroneously construed the will in regard to the bequest under consideration. It will therefore be reversed, with direction to enter a decree to the effect that the bequest was intended for The Missionary Society of the M. E. Church, for use and application in the United States and Territories.

Reversed and remanded with directions.

69 288
170s 131

Joseph G. English v. The City of Danville.

1. PLEADINGS—*Construction of.*—Every pleading is to be taken most strongly against the pleader.

2. SAME—*Allegations of Special Damages.*—When the law does not necessarily imply that the plaintiff has sustained damages by the acts complained of, it is essential to the validity of the declaration that the resulting damages should be shown with particularity in order to prevent surprise to the defendant which might otherwise ensue on the trial, and the plaintiff will not be permitted to give in evidence matters not so stated.

3. DAMAGES—*Damnum Absque Injuria.*—To authorize a recovery for an injury to property by the construction of a public improvement by a municipal corporation, it must appear that there has been some physical disturbance of a right enjoyed as incident to such ownership by the owner of such property.

4. SAME—*Public Improvements.*—A street, or part of a street, may be improved and the adjacent property may be directly benefited thereby, but it does not follow that other localities thereby sustain any damage in contemplation of law.

Trespass on the Case, for damages sustained by the construction of public improvements. Error to the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 4, 1896.

STATEMENT OF THE CASE.

The plaintiff in error declared in case, alleging that he was, and for more than twenty years had been, the owner of

English v. City of Danville.

a certain lot on the east side of Gilbert street, which runs north and south and is forty-nine and a half feet wide; that by general ordinances of the city, in force for ten years, sidewalks on streets of the width of said street were required to be nine and three-fourths feet wide; that by an ordinance recently passed, it was provided that said Gilbert street should be improved between North street and Madison streets by a curbing to be set on each side of the street, fifteen feet from the center line thereof; that on the west side of said Gilbert street between the streets named, the defendant city, contrary to the aforesaid ordinances, wrongfully put, and allowed the owners of lots on said west side to put, curbing twelve feet from the center of the street and thereby suffered and permitted said owners on the west side to enjoy a space twelve and a half feet wide, that is to say, "five feet for sidewalks proper, and seven and one-half feet for sward, shade trees, parks, statuary and ornament, thereby beautifying, ornamenting and enhancing in value the lots aforesaid on the west side of the said Gilbert street, while on the east side of Gilbert street, between the said North street and the said Madison street, the defendant on, that is to say, the 19th day of November, 1895, contrary to the provisions of the ordinances aforesaid, unnecessarily and wrongfully put in the said Gilbert street permanent stone curbing nineteen feet east of the center of said Gilbert street, leaving five and three-fourths feet on the east side of the said street for a sidewalk and allowing no space on the east side for sward, trees, statuary and ornaments, as was allowed on the west side, and thereby greatly depreciated the market value of the lots on the east side, including the said lot owned and occupied by the plaintiff.

And the plaintiff averred that the curbing on the said Gilbert street, between North street and Madison street, and the respective widths of the sidewalks aforesaid on the west and east sides of Gilbert street, were so put, placed, located and established as aforesaid, contrary to the ordinances aforesaid, and were not required to be so put, placed, located or established by any demand or necessity of the public

VOL. 69.]English v. City of Danville.

or the requirements of the public travel or convenience, but were so put, placed or located and established, unnecessarily, arbitrarily, wrongfully and through favoritism, whereby and by reason whereof and of the premises, the plaintiff averred that the value of the said lot owned and occupied by him as aforesaid, was injured and greatly depreciated in value generally, and especially in this, that is to say, that its front on the said Gilbert street was not as handsome and inviting in general appearance; that it had not an equal degree of safety with a lot having a wider sidewalk in its front; that an equal opportunity with the lots on the said west side of the said Gilbert street was not afforded in its front for sward, shade trees, statuary and ornament; that it was to a greater degree subject to the annoyance of the dust, danger and noise necessarily caused by the public travel and traffic in its front on the said Gilbert street; that it was made less inviting and desirable to purchasers seeking lots for residences and that it was otherwise injured and depreciated in its market value by reason of the acts of the defendant in unnecessarily, arbitrarily, inequitably, unjustly and wrongfully curbing, and permitting to be curbed as aforesaid, the said Gilbert street, and in locating and establishing, and permitting to be located and established as aforesaid, the sidewalks aforesaid.

The court sustained a demurrer to the declaration and rendered judgment against the plaintiff for cost. To reverse that judgment the plaintiff has brought his writ of error, and the only question is, whether the declaration sufficiently alleged a cause of action.

D. D. EVANS and WILL BECKWITH, attorneys for the plaintiff in error.

G. F. REARICK, city attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The declaration is quite loose and indefinite in some of its allegations.

English v. City of Danville.

Applying the familiar rules that in pleading everything shall be taken most strongly against the pleader, and that pleadings must not be ambiguous or argumentative, let us ascertain what is the substance of the declaration. It will be noticed that there is a recital of certain ordinances by which it was provided, in the first place, that sidewalks or streets of the width of Gilbert street, were to be nine and three-fourths feet wide, and that later, an ordinance was passed providing for improving a part of this street by a curbing to be set fifteen feet from the center line thereof, and that neither of these ordinances was observed in placing the curbings at the point in question, on either side of the street. The allegation is that the city, contrary to said ordinances, wrongfully put, and allowed the owners of lots on the west side of the street to put, the curbing twelve feet from the center and thereby suffered said owners on the west side to enjoy a space of twelve and a half feet, that is to say, five feet for sidewalk proper, and seven and a half for sward, shade trees, etc. It seems uncertain and ambiguous as to whether this was done by the city or by the abutting lot owners.

There is no definite statement of the terms of the ordinance from which it can be ascertained whether the sidewalk and curbing were to be put in by the city, or by the owners of abutting lots, nor is it averred what was the fact and therefore it seems to be a fair construction that on the west side it was done by the lot owners with permission of the city. As to the east side, it is plainly averred that the city placed the curbing nineteen feet from the center line, leaving but five and three-fourths feet for sidewalk. Thus it is alleged that the city acted, and permitted others to act, contrary to the provisions of the ordinances, as construed by the pleader, but unless the plaintiff has thereby sustained such damages as the law will notice, he has no cause of action. What are the allegations as to damages?

It is averred that by reason of the space of seven and a half feet taken for sward, shade trees, parks, statuary and ornaments, the lots on the west side are beautified, orna-

VOL. 69.]

English v. City of Danville.

mented and enhanced in value, but that no such or any space was left on the east side for sward, shade trees, statuary and ornaments, and thereby the lots on the east side were greatly depreciated in value. In the next sentence it is averred that such action was wrongful, arbitrary and partial, whereby the plaintiff's lot was greatly depreciated in value generally, and especially in this, that its front was "not so handsome and inviting in appearance;" had not "an equal degree of safety with a lot having a wider sidewalk;" that an "equal opportunity with the lots on the west side is not afforded as a part of the sidewalk in its front for sward, shade trees, statuary and ornament;" that it was "to a greater degree subjected to annoyance of dust, danger and noise, necessarily caused by public travel and traffic in its front;" that it was "made less inviting and desirable to purchasers seeking lots for residences," and "otherwise injured and depreciated in its market value." The allegation that the plaintiff's lot was greatly depreciated in value is immediately followed by the statement of certain particulars of damage, with the conclusion that it was otherwise injured, etc. The special damages thus set forth may fairly be presumed to be and include all that the plaintiff intends to claim. It is a settled rule of pleading that when the law does not necessarily imply that the plaintiff sustained damage by the act complained of it is essential to the validity of the declaration that the resulting damage should be shown with particularity, in order to prevent the surprise to defendant which might otherwise ensue on the trial, and the plaintiff will not be permitted to give in evidence matters not so stated. 1 Ch. Pl. 396.

Here there is no implication of law that the acts complained of caused any damage to the plaintiff. Hence he must particularly state the items of injury upon which he will rely, and the general averments of depreciation may be disregarded.

The averment that the plaintiff's lot "is to a greater degree subjected to the annoyance of dust, danger and noise, necessarily caused by public travel and traffic in its front" is not so positive and direct as it should be.

English v. City of Danville.

It is not certain whether the pleader means that the annoyance complained of is greater than it was before the improvement, or whether it is merely greater than that now, or formerly, suffered by the other side. He does not say that it is greater than heretofore, nor whether the increase is due to the improvement or to other causes. He does not aver that the traffic is pushed further east than it naturally or properly would be but for the improvement and, therefore, he sustains greater annoyance in the particulars named. Those particulars are indefinite, and it may well be doubted whether they are of themselves such tangible and certain elements as to furnish a basis for substantial damages. And the averment is but an argumentative statement of the pleader's conclusion as to these items.

It follows that the substance of the plaintiff's complaint is that the city has permitted twelve and one-half feet of the street to be taken on the west side for the purpose of a sidewalk and a sward, and has allowed but five and three-fourths feet on the east side for the purpose of a sidewalk merely. In other words, the city is doing, or permitting the owners of lots on the west side to do, more in the way of ornamentation than on the east side, and is using, or permitting the said lot owners to use, seven and one-half feet of the street for a sward which, it is expected, will be ornamented with statuary, trees, etc.; and as the averment is to be taken most strongly against the pleader, it amounts to this, that the city is merely permitting said lot owners to do so, and thereby the west side is made more attractive than the east, so that lots on that side have become more eligible than those on the east. It does not appear that those on the east side are less valuable than before, in that the use and enjoyment thereof have been in any wise lessened, but the proposition, reduced to its simplest form is that the lots on the west side have been enhanced in value by the means and in the way mentioned.

It is very clear that there has been no physical invasion of the plaintiff's property, and it seems equally so that no physical disturbance of any right enjoyed by the plaintiff,

in connection with his property, is alleged. His right of ingress and egress is not affected; no additional burden is imposed. The improvement which the city has permitted lot owners to make on the west side has enhanced the value of property on that side, but it does not appear that it has diminished the value of that on the east side.

Lots on the west side are more salable than before, and perhaps they will be taken at the higher prices in preference to those on the east side at the prices formerly obtainable. If this can be considered in any sense a damage to the plaintiff it is in a legal sense *absque injuria*, and the city is not to be held responsible.

The fee of the street is in the city, and it may make or permit others to make any improvement therein not inconsistent with the purposes of a street, and unless the property of abutting lot owners is damaged thereby they have no cause of complaint. One street, or one part of a street, may be improved and the adjacent property may be directly benefited thereby, but it does not follow that other localities thereby sustain any damage in contemplation of law. Otherwise there could be no improvements made by the city in one locality without making compensatory, corresponding or equivalent improvements every where else, which, of course, would be impossible.

In Rigney v. Chicago, 102 Ill. 64, it was remarked that there are certain injuries necessarily incident to the ownership of property in towns and cities, which may directly impair the value thereof, for which the law affords no remedy, as, for instance, the building of a jail or a police station, which may depreciate property in the vicinity; and it was further said: "So, as to an obstruction in a public street, if it does not affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives it an additional value, and that by reason of such disturbance he has sustained a special

Schultz v. Reader.

damage with respect to his property in excess of that sustained by the public generally."

We are of opinion that demurrer was properly sustained, and the judgment is therefore affirmed.

Herman Schultz v. Oliver Reader.

1. **DELIVERY—*In Sales of Personal Property.***—A sale of personal property, not being completed by delivery, is ineffectual, and in law void as against creditors.

Replevin.—Appeal from the Circuit Court of Macoupin County; the Hon. JACOB FOKE, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 4, 1896.

ANDERSON & BELL, attorneys for appellant.

D. D. GOODELL and RINAKER & RINAKER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action was replevin, by appellant against appellee, to recover a binder and harvester.

At the close of the testimony offered in behalf of appellant, on the motion of appellee, the jury were instructed to return, and did return, a verdict for the defendant.

This appeal questions the ruling of the court upon the motion.

The machine was originally the property of one Quick. Appellant claimed he became the owner of it by purchase from Quick, and the claim of appellee, who was a constable, was in virtue of a levy made by him upon the machine to satisfy a distress warrant against Quick in favor of one Howell.

It appeared, from the testimony, appellant contracted

with Quick for the machine, and, giving appellant the benefit of all intemperances arising from the evidence, that he paid Quick for it.

But the view of the Circuit Court was, the machine was not delivered to the purchaser, and that the sale for that reason was void, as matter of law, as against creditors.

The machine was under a shed on premises occupied by Quick when the negotiations for the purchase were begun and concluded. It remained there until levied upon by the appellee.

Appellant, after contracting to buy it, went to the shed, collected several detached parts of the machine and laid them on the machine, but did not move it or exercise other acts of control over it, but went away to his home.

On the following day appellee came to the home of Quick and levied upon it and took it away.

It was practicable to move the machine; in fact it was provided with wheels for that purpose. In this respect it was not distinguishable from any ordinary vehicle.

It remained after the sale as fully in the possession and control of the vendor as before the sale.

As to creditors of the vendor the sale, not being completed by delivery, was ineffectual, and in law fraudulent as to creditors. Consult Hewett v. Griswold, 43 Ill. App. 46, and cases there cited.

The fact that Quick notified the constable and Howell the creditor, before the levy was made, of what had occurred between himself and appellant relative to a sale of the machine, had no effect to make legal a transaction which the rules of law denounced as illegal. *Hewett v. Griswold, supra.*

Quick, in answer to the demand of the constable for property to be levied upon, presented a schedule of his property and demanded to be allowed his exemptions.

The machine was not included in the schedule and the constable thereupon proceeded to levy upon it.

Quick insisted that he should be allowed to amend the schedule and include the machine, but the constable refused to allow him to do so.

Lebkeucher v. Bolansen.

Counsel insist he had the right to so amend the schedule in order to enable him to retain the property and complete his contract with appellant.

The statute then in force provided that property omitted from a schedule should be subject to be levied upon. There was no proof the omission was brought about by the fraud of the officer or the creditor.

Appellant did not, when the schedule was signed and sworn to, desire the machine should be listed as his property.

The evidence produced by appellant did not, under the rules of the law, warrant a verdict in his favor, and the court correctly so advised the jury.

The judgment is affirmed.

Jacob Lebkeucher v. Louis Bolansen.

1. **MASTER AND SERVANT—*Risks of the Employment.***—When a person contracts an employment with the distinct understanding that a certain boat, with its engine and boilers therein, is to be used in excavating a ditch, and that a certain engineer is to have charge and control of the same, and that he is to work under his direction, it is a perversion of the law to say that under such circumstances it is the duty of the employer to use reasonable care to provide safe machinery and a competent engineer, for the reason that the parties knew that the boat, equipped as it was, was to be used, and that this engineer was to be in charge.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cass County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 11, 1896.

MILLS & MCCLURE, attorneys for appellant.

BAILEY & HOLLY, attorneys for appellee.

OPINION PER CURIAM.

This is an appeal from a judgment for \$175 against the appellant in an action on the case. The declaration alleged,

in the first count, that defendant being engaged in digging a ditch, employed the plaintiff to work for him, and that in the construction of said ditch it was necessary for defendant to use a certain dredge boat, with the engine, boiler and machinery therein, and that defendant furnished said boat, and that it was his duty to exercise reasonable care and caution to furnish a reasonably good and safe boat, engine, etc., on and about which plaintiff was to work, and to use reasonable care to furnish an expert and experienced and capable engineer to operate the boiler, engine, etc., on said boat; that defendant failed to use due care in both of said matters; that the engine, boiler, etc., so furnished were old, and imperfect and unsafe, and that the engineer was inexperienced, incapable and inefficient, and that while plaintiff was working for said defendant on said boat, and while using ordinary care for his own safety the boiler on said boat, by reason of its unsafe, imperfect and bad condition, and the unskillful management thereof by the engineer, exploded, whereby the plaintiff was injured, etc. The second count alleged in substance the same, with the addition that the engineer was known by the defendant to be competent and skillful, and that through his failure to keep the boiler properly cleaned and supplied with water it exploded, etc. The third count averred that the defendant, by the exercise of ordinary care, might have known that the engineer was incompetent, and the boiler exploded because of its unsafe condition and the unskillful management thereof.

The case, as made by the proof, was that the Hager Slough Drainage District owned a steam dredge boat which was bought to be used in constructing a ditch in said district. The boat was operated under the direction of the drainage commissioners for two years or more and was then sold to an ice company at Alton. Several years later, the drainage commissioners thought it necessary to dredge and clear the ditch and they bought the boat again and brought it back to be used for that purpose.

They had some repairs and changes made, and used the boat during the fall of 1895.

Lebkeucher v. Bolansen.

In the spring of 1895, they proposed to the appellant that he take the contract of completing the work. He finally concluded to do so after having a conference with the appellee, who had worked on the boat as a deck hand, and with one Lon May, who had been the engineer at different times, and under whom the appellee had worked as such deck hand. Both May and appellee urged appellant to undertake the contract, with the understanding that if so, they were to have the positions of engineer and deck hand as before, at certain rates which were then mentioned.

There is some evidence tending to show that they were expecting to share in the profits of the contract also, but this is in dispute. The appellee, who was a former resident in the district, knew nothing, except in a general way, as to the condition of the boat.

He put May in charge with the appellee, and William May, a relative of Lon May, and Jesse Griffin as assistants, and instructed May to put the boat in order and make any needed repairs.

It appears that after such repairing as was thought necessary the work was begun and proceeded several days when the boiler exploded, killing William May and seriously injuring the appellee. Just what caused the explosion is unknown, though the indications are that there was a want of water in the boiler, caused, perhaps, by the muddy condition of the water, or by some temporary stoppage in the pump. It is not shown that the engineer was incompetent, or that the explosion was due to the condition of the boiler, except so far as may be inferred from the fact of explosion.

It is quite apparent that appellee knew when he conferred with appellant in regard to the latter taking the contract, that this particular boat, with the boiler and engine therein, was to be used in the work, and that May was to be the engineer in charge, and further, that he knew much more about May's competency as an engineer than did appellant, and that he knew as much as to the condition of the boat as did the appellant.

The case was put to the jury by the instructions as though

it was the ordinary one of a person being hired by another for the work in question, with the legal implication that the employer was to use due care to furnish safe machinery and competent servants, while the fact was, that the employment was with the distinct understanding that this boat, with the boiler and engine therein, was to be used, and that this engineer was to have charge and control of the same, and that appellee was to work under his direction. It is a perversion of the law to say, under such circumstances, that it was the duty of the master to use reasonable care to provide safe machinery and a competent engineer, for the reason that the parties knew and intended that this boat equipped, as it was, should be used and this engineer was to be in charge.

The appellee must be deemed to have assumed any risk incident to the service under these contemplated conditions. The judgment will be reversed and the cause remanded.

William T. Baker v. James W. Fawcett et al.

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15 564

1. **DEMURRERS—Waiver of.**—Pleading to the merits after a demurrer has been overruled amounts to a waiver of the demurrer and an admission that the pleading demurred to states a legal ground of action or defense.

2. **GENERAL ISSUE—Recoupment under Plea of.**—In a suit on notes given for the rent of a tract of land, the tenant may prove, under the general issue by way of recoupment, that the land was not tiled as the landlord represented and that he suffered damages in consequence.

3. **PAROL EVIDENCE—Failure of Consideration of a Note—Other Instruments as Part of the Transaction.**—The provisions of Sec. 9, Chap. 98, R. S., allowing the defense of failure of consideration of a note, has necessarily modified the rule of evidence against varying a writing by parol proof. And the rule must give way not only as to the note, but also as to any other written instrument executed in connection with and forming a part of the transaction out of which the note arose.

4. **PAROL EVIDENCE—To Vary a Written Instrument—When the Rule Against, is Waived.**—The general rule that either party to an agreement, which has been reduced to writing, may insist that the writing alone shall be resorted to, to determine the terms and conditions of the

Baker v. Fawcett.

agreement, may be waived, and is waived, if the parties enter mutually into a contest to establish the agreement by parol evidence.

5. **WARRANTY—*Mere Expressions of Opinion Do Not Amount to.***—To constitute a warranty or to amount to a false representation, it is essential that the statement relied upon must be of some material fact and not merely an expression of opinion.

6. **EVIDENCE—*When Statements as to Condition of Land Are Not Opinions.***—Where a landlord knew where tiling on his land had been placed, the size of the tile and how it had operated, it is not unfair to assume that he knew whether additional tile was required, and therefore not unreasonable to consider his statements, with reference thereto, not as mere expressions of opinion, but as statements of fact, based upon actual known results. At least the question may properly be submitted to a jury to decide.

Assumpsit, on notes for rent. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 11, 1896.

STATEMENT OF THE CASE.

Appellant brought assumpsit against appellees to recover on two promissory notes, each in the sum of \$400. They pleaded the general issue and two special pleas of failure of consideration. Appellant was given a judgment in the sum of \$20, and has appealed to this court.

The first special plea averred that appellant leased certain farming lands to appellee Fawcett for one year, at and for the gross rental of \$800, and that Fawcett and appellee Hunter, as his surety, executed the two notes sued upon to secure the payment of said \$800; that said appellant stated and promised to Fawcett that the lands so to be leased were tiled wherever it needed it and that said appellee relied upon such statements, and in consideration thereof, leased the lands and executed the notes sued upon, and that said statement as to the tiling was not true; upon the contrary, as appellant well knew, the land was poorly tile drained, and in places where tile was greatly needed was not tiled at all. Therefore, it was averred, the consideration for said notes wholly failed, except as to the sums of money already paid thereon.

The second plea averred the appellant knowingly, falsely

VOL. 69.]Baker v. Fawcett.

and fraudulently represented to Fawcett that the lands were well tiled drained, and that appellant then knew such representations were false and fraudulent, etc., and that Fawcett relied upon such statements as being true and leased the land and executed the notes in consideration of the truth of such representations and that such statements were false and that for the lack of tiling, twenty acres of the leased lands could not be cultivated, and the crop of corn upon another twenty acre portion of it was flooded and destroyed and the crop upon another tract of forty acres was damaged because the land was not tiled, etc., to the damage of appellee Fawcett of \$1,600, wherefore the consideration paid had failed, etc. Appellant interposed a demurrer to each of the pleas, but the court ruled the demurrs were not well taken and the appellant replied to each plea, in effect denying he warranted the land to be tiled, or made the alleged false representations.

It was agreed by the parties that the note for \$400 first falling due had been fully paid. A lease in writing was executed, in which the contract between the parties as to the time of the renting and the amounts to be paid was set out.

A trial before a jury upon the issues resulted in a verdict for appellant in the sum of \$20. The plaintiff appealed.

FRANK P. DRENNAN, attorney for appellant.

McGUIRE & SALZENSTEIN, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellant, by demurrer, questioned whether the pleas presented a legal ground of defense to the action.

The court overruled the demurrs and appellant did not abide the issue of law presented by them, but by appropriate replications raised issues of fact and submitted such issues to a jury for decision.

We see nothing to take this feature of the case out of the

Baker v. Fawcett.

general rule that pleading to the merits shall be deemed an admission that the pleas state a legal ground of defense. Shreffler et al. v. Nadelhoffer, 133 Ill. 536; Green & Co. v. Blodgett, 159 Ill. 173.

Moreover, it was competent to prove the facts set forth in the pleas, and damages accruing by force thereof under the general issue by way of recoupment. Babcock v. True, 18 Ill. 420; Schuchman v. Knoebel, 27 Ill. 175.

We do not think the court erred in holding it was competent to prove by parol that appellee was induced to execute the lease by the fraudulent representations of appellant.

The provisions of Sec. 9, Chap. 98, R. S., allowing the defense of failure of consideration of a note, has necessarily modified the rule of evidence against varying a writing by parol proof.

In order to give effect to this statute, the rule must necessarily give way, and, as we think, not only as to the instrument in suit—the note—but also as to any other written instrument executed in connection with and forming a part of the transaction out of which the consideration for the note arose.

The note in the case at bar and the lease were but parts of the same transaction, and for the purposes of the suit, were properly, in view of the statute, regarded by the court as one writing.

Aside from this, no objection was made in the trial court to the introduction of parol proof of the representations of the appellant, set forth in the special pleas, and such objection can not be availed of for the first time in a court of review.

The general rule that either party to an agreement which has been reduced to writing may insist that the writing alone shall be resorted to to determine the terms and conditions of the agreement may be waived, and is waived if the parties enter mutually into a contest to establish the agreement by parol testimony.

In the case at bar neither of the parties objected to the introduction of parol testimony, but each voluntarily pro-

duced and relied upon testimony of that character to maintain his position before the jury.

There was therefore no legal reason or rule of evidence or pleading why testimony thus produced should not have been considered by the jury as applicable to the defense presented by the special pleas that the consideration of the note had failed, or in reduction of the plaintiff's damages by way of recoupment under the general issue if there was a warranty and breach thereof.

The complaint that the court erred in refusing to allow appellant to prove the rental value of the farm is not well grounded.

The argument in its favor ignores the controlling consideration that the parties, as each of them admitted, had agreed upon and fixed the sum to be paid for the use of the land.

Appellee was entitled to enjoy the land at the contract price and if he was entitled to damages because of the breach of other conditions of the contract, such damages should go to the reduction of amount he had agreed to pay. The reasonable rental value was therefore wholly immaterial.

We agree with counsel for appellant that to constitute a warranty or to amount to a false representation it is essential the statement relied upon be in respect of some material fact and not merely an expression of opinion.

The representations in question were as to the manner in which the farm was tiled and drained. The appellee knew where the tiling had been placed, the size of the tile and how the drains had operated. It was not unfair to assume he knew whether additional tile was required and therefore not unreasonable to consider his statements with reference thereto, not as expressions of mere opinion but as statements of fact based upon actual known results. At the least, the question was one within the province of the jury to decide.

It is urged as a general ground of objection to the instructions that they are so framed the jury were authorized to consider remote consequential and speculative damages.

We do not agree that the criticism is justly made, but, as

Illinois State Journal Co. v. Green.

it is not complained of in the briefs of counsel that any testimony was offered or admitted which tended to establish remote consequential or speculative damages it could not be contended any injury to appellant could have resulted in this respect.

The objection that the proposition of law announced in the second instruction given for the appellee is not the correct one, can not be urged by appellant for the reason he procured the court to declare the same proposition to be the law in the second instruction given in his behalf. We think both instructions were properly given.

It is urged that the fifth instruction lays down an incorrect rule as to the measure of damages. This instruction does not purport to announce any general rule or rules for measuring appellees' damages but enumerates a number of items or elements of damages proper to be considered by the jury if proven, and a case otherwise made for the appellee. The objection made by counsel does not direct our attention to or challenge any particular element or item mentioned in the instruction, and the error, if any there be, has not occurred to us upon inspection of the instruction. The suggestion that the jury might well understand, from the instruction last given to them, that appellee might lawfully be awarded damages in a sum greater than the amount of the plaintiff's claim need not be further noticed than to say that as the jury rendered a verdict for the appellant it is clear they were not misled by any such supposed error in the instructions, if any such error might there be found.

The record contains testimony sufficient to support the judgment. We think no error of law intervened. The judgment is affirmed.

Illinois State Journal Company v. Charles Green, Jr.

1. **BY-LAWS—Typographical Union—A Rule Construed.**—In a suit against the publishers of a newspaper, it was shown that they had adopted the rules of the Typographical Union in regard to the operation of typeset-

ting machines, one of which was as follows: "Fifth. Learners to be paid at the rate of eight dollars per week, for the first thirty-six days' work, after which they shall be paid as journeymen." The plaintiff construed this rule to amount to a contract for the full period of thirty-six days and the trial court so decided. *Held*, that this was error, and that the rule had no effect to fix the term of employment.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 11, 1896.

BROWN, WHEELER & BROWN, attorneys for appellant.

CONNOLLY, MATHER & SNIGG, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The appellant company was engaged in the publication of a weekly and daily newspaper and doing job printing.

Appellee was a typesetter in its employ, and a member of an organization called the Typographical Union.

The company concluded to set type with machines lately invented for that purpose.

These machines are complicated and of delicate mechanism, and those operating them must have skill and experience.

The Typographical Union formulated a code of rules for the government of operators on such machines, and those seeking to fit themselves for such positions, and the employers of such workmen.

The appellant company adopted the code, and appellee began work for it as a "learner" on one of the typesetting machines; worked twenty-three days and was discharged.

One of the rules of the Typographical Union, before referred to, is as follows:

"Fifth. Learners to be paid at the rate of eight dollars per week for day work, and nine dollars per week for night work, for the first thirty-six days' work, after which they shall be paid as journeymen."

Eden v. Bohling.

Appellee construed this rule to amount to a contract to employ him for the full period of thirty-six days, and brought suit to recover for the entire time. He prevailed, and the company appealed.

The purpose of the rule was to fix the price to be paid "learners," the period of time during which operators should be deemed "learners," and when one who began as a "learner" should be recognized as a journeyman, and become entitled to receive a journeyman's wages.

The rule, as we construe it, had no effect to fix the period or term of employment of either learners or journeymen.

Therefore the judgment must be and is reversed and the cause remanded.

Walter Eden, Executor, v. George B. Bohling, Walter S. Craig and Emma Lee.

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1. **HUSBAND AND WIFE—*Gifts of Household Furniture.***—A gift of household furniture by a husband to his wife, whether in writing or by parol, is valid, except as against his creditors at the time.

2. **VERDICTS—*Evidence Discussed and Verdict Approved.***—In this case the court discusses the evidence and holds that the verdict of the jury was properly rendered.

Replevin, for household furniture. Appeal from the County Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

JOHN R. EDEN, attorney for appellant.

R. M. PEADRO and F. M. HARBAUGH, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of replevin, brought by appellant

against appellees, to recover the entire outfit of household and kitchen furniture, described by items, remaining and found in the residence of Edwin L. Shepherd upon his death.

Of these, one cook stove with its utensils, one rocker, one feather bed, one mattress, one bedspring, one bedstead, and one other bed spring were claimed by the defendant Emma Lee, and all the rest by the defendant Bohling, as trustee under the will of Anna M. Shepherd, except one lounge, two carpets and wearing apparel of Edwin L. Shepherd, which defendants disclaimed.

These claims were set up by appropriate plea, and the issue made by replication thereto was the only matter in controversy.

The jury found for the defendants; upon which, after a motion for a new trial overruled, a judgment followed, awarding a return of the property replevied, and plaintiff appealed.

Edwin L. and Anna M. Shepherd were husband and wife. They commenced their married life with little means. In April, 1881, they opened the Maple House in Sullivan, which was burned in 1882 or 1883, whereby a portion of the furniture was destroyed. They then went to Missouri, where they remained twelve or fifteen months, when they shipped their goods and returned to Bethany, Ill. In April, 1886, he went into the saloon business at Sullivan, in which he was successful, and from time to time during her life purchased and put into their residence addditional furniture, besides accumulating a considerable sum of money.

On the 16th of December, 1889, she died, leaving no descendent, but a will, which was duly probated, January 6, 1890, whereby she devised certain town lots and bequeathed her personal property (except her piano, which she left to Mrs. Margaret Craig), including "all the household furniture, books and works of art," to appellee George B. Bohling, as trustee for her husband, all of which, or the income, or if necessary, the principal of the proceeds of such as should be sold, were to be held, invested and paid over by said trustee,

Eden v. Bohling.

as therein directed, for the use and benefit of her said husband for and during his natural life, except that her brother, William A. Hawkins, was to have the use of two lots in Sullivan, described, during the lifetime of her said husband, rent free, provided he kept them in good repair and paid all taxes and assessments thereon. It directed that her husband should take the best care of her mother while they lived, and if she survived him, that the trustee should "procure the best care possible" for her during her natural life; that if any of the real estate mentioned should remain unsold at the death of her husband, then two lots described, "together with the household furniture, should be sold by said trustee, George B. Bohling, to the highest bidder, and the proceeds of said sale divided, share and share alike, between Mrs. Etta Bohling, wife of George B. Bohling, and Mrs. Margaret Craig, wife of Walter S. Craig," and the other lots remaining should descend to her brother, William H. Hawkins, his heirs and assigns forever. Whatever other personal property, "notes, accounts, money and security for money, evidences of debt and of title" should also be so left, was to be disposed of by said trustee in the best possible manner and the proceeds divided equally between Mrs. Bohling and Mrs. Craig, above named.

This will was dated September 14, 1889, three months before her death, and appellant introduced evidence of her statement that she so disposed of the household furniture in order that the creditors of her husband or his brother should not deprive him of the use of it or of its proceeds.

It appears that on June 14, 1878, Edwin L. Shepherd made to his wife a bill of sale of the household furniture they then had, which was put on record in the clerk's office at Sullivan. How he disposed of what he bought afterward during her life was not directly shown, but the jury may have well inferred from the fact of such transfer in 1878, his apparent acquiescence in the provisions of her will, and his own will, that he had given it also to her.

He died April 24, 1895, having survived her upward of five years, during which he continued to keep house, use the furniture and carry on his business as before.

By his will dated March 20, 1895, and duly admitted to probate, he made specific bequests of all the property therein mentioned, without an allusion to household furniture. After directing the payment, first, of his funeral expenses, the only indebtedness against himself or his estate referred to, he bequeathed to James W. Winters, in trust for the support and education of T. E. Craig, a certificate of deposit for \$800, and also \$1,000 to be paid to him out of any money that might be due and owing to the testator at the time of his death, or thereafter to become due to his estate from George B. Bohling of Versailles, Missouri; and directed that whatever should remain of this fund when the beneficiary arrived at full age be paid over to him. Next, he bequeathed another certificate of deposit, also for \$800, to appellee Emma (in the will named Emily) Lee, and provided that in case of the death of said T. E. Craig before he shall arrive at the age of twenty-one years, whatever should then remain of the fund bequeathed in trust for him should also go to her. Lastly, he bequeathed "any saloon fixtures and stock" of which he should be the owner at the time of his decease, to James W. Winters. The property above mentioned is all that is disposed of by the will or in any way therein referred to.

It contains no residuary clause, nor any general description which might cover household furniture. Whatever may have been the indebtedness referred to as due or becoming due from George B. Bohling, it could not have had any relation to the household furniture, or any other property bequeathed or devised to him in trust by the will of Mrs. Shepherd. For the testator himself had the possession and use of it to the time of his death. It does not appear that Bohling ever received a dollar on account of any of the trust property. If her husband gave her the furniture she so disposed of, whether by an instrument in writing or not, the gift was valid, although they were living together, except as against his creditors at the time, if there were any. R. S., Ch. 68, Sec. 9. But the record contained no intimation that he was at all in debt when he made the bill of sale in

Eden v. Bohling.

1878, or at any time thereafter came to be so. He seems to have been devoted to her. Although they had no child and the family consisted of themselves, and perhaps his mother-in-law, he relieved her of labor and care as far as he could by employing a housekeeper and generally another woman servant. The expressions and provisions of her will indicate that she was equally devoted to him. She left to him, and protected for him against possible creditors, the use for life, of substantially all she had, and trusted him to take care of her mother. When he came to make his will he must have known of these provisions of hers. He could not have overlooked the furniture, nor would an intention to leave it as intestate property be presumed. From these facts, notwithstanding he may have always paid the taxes on it and been heard at times to speak of it as his, it may be fairly inferred that he had given her all of it that she attempted to dispose of.

Of that claimed by appellee Emma Lee, there is positive proof that he gave her the cooking stove and utensils, the rocker and one bedstead. He bought them at different times, and expressly stated that he bought them for her and gave them to her. His regard for her is sufficiently attested by the liberal bequests he made to her. She had been his housekeeper for years, had gone with the family to Missouri, been with them ever since, nursed him throughout his last illness, and, with appellee Walter S. Craig, as a representative of trustee Bohling, was in possession of the house and furniture when the writ of replevin herein was executed. The articles above mentioned as given to her by him, excepting the cooking stove and utensils, were then, as they had been, in the room she had occupied as hers, and in use by her. She had no other residence, and their presence and use therein by her was sufficient evidence of their delivery by him and actual possession by her. The ownership of the other articles claimed by her is not directly shown, but they also were in the house, if not in her room, and since they were neither claimed by the trustee, nor disposed of by the will of Mr. Shepherd, we will not say the jury

were not justified in finding they were not the property of appellant as executor of last will.

Errors are assigned upon some of the rulings in regard to the instructions and evidence, but we see in them nothing materially wrong or requiring particular notice. The judgment will therefore be affirmed.

Sophronia B. Harding v. Andrew Harding.

1. **TRIAL BY THE COURT—*Presumptions in Favor of.***—Where a case is tried by the court it is presumed that the law was properly applied to the facts by the court unless the record affirmatively shows to the contrary.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cass County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

CHARLES A. BARNES, attorney for appellant; HENRY PHILIPS, of counsel.

R. W. MILLS, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Assumpsit brought by appellant against appellee, tried by the court without a jury and resulting in a finding and judgment for the defendant, from which, on exception duly taken, this appeal is prosecuted.

The sole cause of action was a promissory note of which the following is a copy:

“August the 30th, 1885.

On or before the first day of June, 1886, I promise to pay S. B. Harding \$700, for value received.

ANDREW HARDING.”

Three pleas were filed—the general issue, total want of

Harding v. Harding.

consideration and set-off of indebtedness for personal property, by the defendant sold and delivered to the plaintiff.

To the first the *similiter* was added; to the second a replication that the note was given for a good and valuable consideration, concluding to the country; and to the third two replications, first, the statute of limitations, and second, that plaintiff was the wife of defendant; that he abandoned her and her minor child, and has since failed to support her; that he also abandoned and left with her the property mentioned in said plea of set-off, and that she used the same and the proceeds in the necessary support of herself and said minor child.

We do not find in the record that any issue of fact or law was made upon either of these replications. Yet in the statement prefixed to the brief of appellant it is said that the court found for the plaintiff as to the note—that it was given for a valuable consideration and was a subsisting obligation, but also that she was indebted to the defendant as alleged in the plea of set-off, and holding that it should be allowed against her claim, rendered judgment for him. It was further said that this had been conceded by defendant's counsel on the trial below and no doubt would be here. This expectation, however, was disappointed. Counsel did not so concede here nor admit that he had done so there, but argued among other points that if the court did find for the defendant on that plea such finding was well sustained by evidence.

We have no means of knowing judicially with certainty what the finding was on any of the particular issues. The record only shows, generally, that the court found for the defendant. No propositions of law were submitted by either party. It must therefore be presumed that the law was properly applied to the facts by the court, sitting as a jury, unless the record affirmatively shows to the contrary. *Belleville Savings Bank v. Bornman*, 124 Ill. 200; *Montgomery v. Black*, *Ibid.* 57; *Tibballs v. Libby*, 97 *Id.* 552, and other cases cited in these. No error is assigned on any ruling as to the admission or exclusion of evidence. Every

VOL. 69.]Smith v. Smith.

one except the last, which is general—that the court erred in rendering judgment for the defendant—rests upon the assumption of a finding for the defendant on his plea of set-off.

From the fact already stated, that he did not rejoin to either replication to that plea, each concluding with a verification, and from his own testimony we would infer that the assumption was unwarranted, and from the evidence, that it was upon the second plea, which was that there was no consideration for the note. In that view the only question would be whether there was evidence sufficient to support it; and if there was, the judgment was required, whatever may have been the view of the court as to the counter claim.

The parties were and are husband and wife, married in 1856, and having grown up children, but living unhappily together for years before the note in suit was made. They, and so far as appeared, they only, knew why it was made; and upon the question whether it was for any good or valuable consideration their testimony was in direct and irreconcilable conflict. It would be useless to discuss or even state it in substance. So far as we can infer from the facts testified to by others, simply as they appear in the record, it seems to us that the reasonable inferences and probabilities are at least quite as strongly in favor of appellee's version as of appellant's. We must therefore defer to the finding of the judge who saw and heard the witnesses.

Joseph W. Smith v. Selina Smith.

69 314
189s 623

1. **VERDICTS.—*Can Not Be Impeached by Statement of Juror.***—The statement of a juror, sworn or unsworn, however clear, is not competent to impeach a verdict rendered by a jury of which he was a member.

2. **PLEADING.—*Allegation of Want of Jurisdiction.***—In a suit for divorce the plaintiff filed an amendment to his bill alleging that the defendant had been previously married; that such prior marriage had

Smith v. Smith.

never been legally dissolved, and that a pretended divorce was granted without jurisdiction of one of the parties and was therefore void. This was averred however not absolutely, but "as shown by a bill filed to set aside the said decree of divorce." The amendment also stated that the latter bill was still pending. *Held*, that a demurrer to the amendment was properly sustained.

Bill for Divorce.—Appeal from the Circuit Court of Douglas County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

J. M. NEWMAN and I. A. BUCKINGHAM, attorneys for appellant.

THOMAS W. ROBERTS and ECKHART & MOORE, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On August 5, 1895, appellant filed his original bill herein against appellee for divorce, on the ground of extreme and repeated cruelty. It alleges that they were lawfully married at Joliet, Illinois, on October 8, 1893, and cohabited until some time in July, 1895, when she left him and went to Chicago. Appellee answered, denying the charge, and filing a cross-bill averring extreme and repeated cruelty on his part, which he by answer denied. Replications were put in by the parties respectively. On the issues so made up, the jury found for the defendant in the original, and complainant in the cross-bill. A new trial was denied, and a decree entered for appellee for divorce and alimony.

Besides the point that the finding was against the evidence, which is discussed at unusual length, the argument for appellant calls attention to only two points in respect to which it is claimed the court erred.

One of the reasons assigned for the motion to set aside the verdict was, that in the evening after it was returned, one of the jurors being asked how they came to render such a verdict upon the evidence, answered in the presence of several parties, in substance, that they all thought that appellant was entitled to it, but gave it to appellee because

VOL. 69.]Smith v. Smith.

both wanted a divorce, and the jury thought she ought to have something but wouldn't get anything if they found for him. This is said to have been supported by affidavits of the persons so present. Neither of these is copied in the abstract, and only one purports to be stated in substance. From that the language of the juror does not appear, nor that of any other as stated by him, if any was stated, from which he formed the opinion of what they "thought."

But the statement of a juror, however clear, sworn or unsworn, is not competent to impeach the verdict. The court therefore properly disregarded it.

Before the commencement of the trial appellant, on leave for that purpose obtained, filed an amendment to the original bill, alleging that on or about the 14th of August, 1883, the defendant was lawfully joined in marriage with one Bernard Iago, in Chicago, and cohabited with him until about the 25th of May, 1887, when he became insane, and being so found by a commission duly impaneled, was taken to the hospital at Dunning, where he has remained confined ever since; that about the 10th of June, 1893, while he was so confined, the defendant, then his wife, filed her bill in the Circuit Court of Cook County for a divorce from him on the grounds of extreme and repeated cruelty, habitual drunkenness and desertion; that on the 13th of September 1893, a decree for her divorce was obtained thereon; that no legal service of summons in said proceeding on said Iago was had, and said decree was made by said court without any jurisdiction of his person, and upon false and perjured testimony furnished, produced and given by said defendant.

All this is averred in the amendment, not absolutely, but "as shown by the bill filed by said Bernard Iago in the said Cook County Circuit Court by his next friend, Anna Brock, in case No. 145,564, to set aside the said decree of divorce," a copy of which said bill is attached to the amendment as an exhibit and made part of it. And it further avers that said Bernard, by his said next friend, has procured a certificate of evidence in said divorce proceeding and sued out a

Smith v. Smith.

writ of error from the Appellate Court to reverse said decree, and said cause is now pending on said writ of error.

From the abstract it appears that this amendment was filed as a separate pleading or paper, after the issues had been made up, and that a "demurrer" thereto was sustained. Whatever was the form in which the matter was presented to the court, it does not appear that any objection was made to it, nor that any exception was taken to the order of the court thereon, though it is here urged as a grave error.

The amendment was manifestly impertinent. It admitted a decree for appellee's divorce from her former husband, rendered by the Circuit Court of Cook County, where both the parties then resided, nearly a month before her marriage to appellant, and that the question of its validity raised since said marriage, is regularly pending before the court that rendered it, or that which alone had power to review it, or both. Appellant did not offer the record of that decree as evidence against appellee, upon a prayer that the marriage in fact be declared void in law *ab initio*. In such case, if the record on its face showed that the decree was rendered without jurisdiction of his person, the court might have entertained objection on that ground and excluded it. But here both the original and cross-bill made and rested upon the allegation of a lawful marriage between the parties and asked a divorce for a cause afterward arising. The amendment did not set out the decree or summons or return thereof, in *hicce verba* or in substance or legal effect, nor aver any facts showing a want of jurisdiction of the person of Iago or the character of the evidence produced on the hearing of that case, but only that it was so averred in the bill filed on his behalf to set aside the decree, and that the proceedings on that bill or, if not also on review of the decree therein by the Appellate Court, were still pending.

In that state of the case the Circuit Court of Douglas County had no power, upon the matter thus presented, to entertain the question of the validity of that decree, and the amendment was properly ruled out.

As to the remaining questions, which were purely questions of fact—whether each of the parties, or either and which, had been guilty of extreme and repeated cruelty to the other—the evidence was so conflicting that we can not properly overrule the finding of the jury. The decree will therefore be affirmed.

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18s 446

Elizabeth Mann v. Dennis Forein, Jr., Ex'r, etc.

1. **WITNESSES—Competency of Husband or Wife.**—A husband or wife can not testify for or against each other, where the adverse party sues or defends as the representative of any deceased person.

2. **EVIDENCE—Identification of Notes.**—In a suit on a note for \$5,000 a statement by a witness, that he heard the alleged signer of the note say the plaintiff “has a note—now holds a note against me for \$5,000,” is not sufficient to warrant the admission in evidence of the note sued on without further identification as the note referred to in such statement.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

SALMANS & DRAPER, attorneys for appellant.

KIMBROUGH & MEEKS and CALHOUN & STEELY, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Assumpsit brought by appellant against appellee on an alleged promissory note of the testator, who was her father, of which the following is a copy:

“FAIRMOUNT, ILLINOIS, April 6th, 1882.

I promise to pay to my daughter, Elizabeth Mann, five thousand dollars at my death, for value received.

his
DENNIS X FOREIN.”
mark.

The pleas were, 1st, the general issue; 2d, denying the execution of the instrument sued on, verified by affidavit of,

Mann v. Forein.

the defendant upon information and belief; and 3d, no consideration other than natural love and affection; on which issues were made up and the cause was submitted to the jury, who returned a verdict for the defendant. The court having denied the motion to set it aside, and having rendered judgment thereon, the defendant took this appeal.

On the trial plaintiff called as a witness William Mann, who, after testifying that he was her husband, was asked to look at the instrument sued on and state if he knew who executed it. Counsel for defendant objected that plaintiff herself being incompetent to testify on her own behalf, her husband was, for that reason, also incompetent, which objection was sustained by the court and he was excluded.

This ruling was in accordance with repeated decisions of the Supreme Court. *Treleaven v. Dixon*, 119 Ill. 548; *Stodder v. Hoffman*, 158 Id. 490, where other though not all of the preceding cases are cited.

George Mitchell was then called for the plaintiff and testified that he was well acquainted with the testator in his lifetime; lived about a quarter of a mile from him, and that about the middle of September, 1892, in witness' father's yard, he heard him say that Mrs. Mann "had a note—she now held a note against him for \$5,000." Upon his cross-examination some matters were brought out which might have been subject to comment before the jury as bearing against the reliability of his testimony, but are not material to the question here presented, which is whether, if true, the statement of the testator to which he testified was sufficient to warrant the admission in evidence of the instrument sued on. Without further identification as the note referred to in that statement, it was offered, but on objection by plaintiff excluded, and the jury were instructed to find the verdict they did.

We think the action of the court was fairly sustained by the cases cited in the brief for appellee. *Glazier v. Streamer*, 57 Ill. 93; *Sheller v. McKenny*, 17 Ill. App. 189; and *Wurster v. Reitziner*, 5 Id. 114. Our attention has not been called to any authority to the contrary. The judgment will therefore be affirmed.

Fritz F. Gerdes v. Edwin W. Hill.

1. **VERDICT—On Conflicting Evidence.**—A verdict upon conflicting evidence is in general conclusive.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

KEEFE & BUDD and JESSE PEEBLES, attorneys for appellant.

A. N. YANCEY and E. W. HAYES, attorneys for appellee.

OPINION PER CURIAM.

Action commenced before a justice of the peace for a balance claimed on a promissory note of appellant, assigned before due to appellee, for \$175. On trial *de novo*, upon appeal to the Circuit Court, the jury returned a verdict for plaintiff for \$90. A new trial was refused and judgment on the verdict rendered, from which defendant appealed.

The defense was payment, and on this single question of fact the evidence was conflicting, but in our opinion clearly sufficient to support the finding. Perceiving no material error in any ruling of the court, its judgment will be affirmed.

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Alexander Beaver v. Danville Shirt Company.

1. **SALES—Change of Possession.**—Change in possession should be indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods.

2. **ESTOPPEL—Duty of One Who Mixes His Goods with Another's.**—It is the duty of a party who mixes his own goods with others, which are subject to the levy of an execution, to point out to the officer the

Beaver v. Danville Shirt Co.

goods owned by him, and if he fails to do so he is estopped from afterward claiming them.

3. **FRAUDULENT SALES—*Knowledge of the Purchaser.***—A purchaser of goods from an insolvent, with knowledge that the effect of his purchase is to hinder and delay the creditors of the seller, and that such was the seller's intention in making the sale, can not hold the goods as against such creditors.

Trial of the Rights of Property.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

C. M. BRIGGS, attorney for appellant.

DYER & WALLBRIDGE, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a trial of the right of property under the statute, commenced before a justice of the peace and taken by appeal to the Circuit Court, where the verdict and judgment were against the claimant, who prosecutes this further appeal.

For some four years next before and up to September 12, 1895, if not to a later date, Nathaniel and Chauncey Beaver, as partners under the firm name of Beaver Brothers, carried on a retail business in dry goods, carpets and gentlemen's furnishings at Hoopeston. On the 23d of November of that year appellee placed in the hands of a constable an execution duly issued upon a justice judgment it had recovered against them for \$68.50, and caused it to be levied upon the goods in controversy, consisting of certain trunks, valises, rugs and parts of rolls of carpet then in the store as part of the stock. Appellant claims that on the day first above mentioned he purchased their entire stock, and at the time of said levy was the sole and absolute owner thereof; and the question in the case is whether the alleged purchase was valid as against the execution.

Appellee contests it on two independent grounds: First,

that no apparent change of possession accompanied the purchase or followed it before the levy. From the abstract of the testimony it does not appear that anything whatever was done that was calculated to notify the public or anybody not in the employ of the firm or of appellant of any such change. It does not show that he was a younger brother of these execution debtors, who, after some years residence in Spokane, Washington, in January, 1895, returned to Hoopeston and there remained until the last of February. During that time he was in his brother's store, assisting about the business. Among other things, with the help of Mr. Evans, the head clerk, he made an inventory of the stock, amounting to \$15,500. He then went to Chicago, as he says, to "make experiments in cabinets or showcases," and was there off and on for about five months, repeatedly returning to Hoopeston, which he says he considered his home, and whenever there assisted in the business of the store. He was there about the first of September, went back to Chicago and returned about the tenth, two days before the alleged purchase. His going and returning continued after it, as before, so that, so far as appeared, his presence and conduct there after it, was no more an indication of possession or proprietorship than before, except, perhaps, to the employes. He says that whenever he went away after it, he left Mr. Evans in charge of the store and cash, but if anybody else knew it, the fact was not shown. His brothers also continued to be there daily, caring for the stock and assisting in making sales. He testified that he employed them to be and do so, paying one a stipulated monthly salary, and the other, who did less work, only as he needed him from time to time; but the appearance was not noticeably different from what it had been. In short, no proof whatever of any such difference, either in the service of the store or the conduct of its business, or in any visible sign or notice of ownership of the stock, was made or offered. The general statements that appellant took possession and that the business was thereafter conducted very differently, without any particulars other than those above

Beaver v. Danville Shirt Co.

mentioned, must be regarded as of little or no weight, and we are of opinion that the jury might well have found a lack of the requisite change.

It was further claimed as ground for the impeachment of the sale that it was made by the vendors with intent to disturb, hinder, delay or defraud their creditors, and that the vendee is chargeable with notice of such intent.

It appears that their business had not been successful. According to their own statement, they had been selling for the last year without any profit, and were satisfied that they could not make any money in it. For that reason, as admitted by both the parties to it, the sale was proposed and made. The firm was largely indebted—to appellant himself, in \$2,000 for borrowed money; to wholesale dealers and jobbers, for goods, in \$5,000, of which something over \$2,000 was then due and out of their power to pay. A little more than two months after the sale, they failed to pay or turn out anything on the small judgment of appellee, and suffered the execution to be levied. They sold the entire stock, which was all of their tangible property, for the sum of \$9,000, considered to be about sixty per cent of the estimated invoice value, but really all it was worth or could be sold for, of which sum \$1,000 was in appellant's verbal promise to pay in fifteen days, and \$5,000 in his six or more unsecured notes, running from October, 1895, to some time, not shown, in 1896. At the time of the sale he canceled the \$2,000 debt due him, and paid \$1,000 in cash.

The inevitable effect of this sale to disturb, hinder and delay, if not also to defraud creditors of the vendors, is sufficiently illustrated by this case of the appellee. But for it, this debt would have been voluntarily paid on demand, at any time after it became due, or its satisfaction promptly compelled by the execution. But having, by means of it, disposed of all their property that could be so reached without their consent, they were enabled, although they had received its equivalent in cash and notes which could not be so reached, to defy this creditor, refuse to pay one dollar of its small but just claim, and subject it to the

further and needless expense and delay of this proceeding to obtain satisfaction. This the jury could readily see and understand.

These vendors are presumed to have had knowledge of this effect, and having chosen to avail themselves of it after the sale, may reasonably be further presumed to have intended it when they made the sale, and if made with such intent, it was, in view of the law, fraudulent on their part.

Appellant, the vendee, being also a creditor to the amount of \$2,000, could lawfully receive from them so much of their stock specified as would fairly satisfy that claim, if he received it in good faith for that purpose, notwithstanding any fraudulent intent on their part with reference to other creditors and his knowledge of it. But of the residue, valued at \$7,000 and not distinguished, he was strictly a purchaser; and if he had knowledge of such intent, or of circumstances that should have put him upon inquiry which would have led to it, his purchase was void as against appellee's execution and levy. Then did he have such knowledge?

He was their brother, knew their business had not been profitable and that they were in debt to others besides himself, but had no idea of the amount. Yet he never inquired. Their books showed it. He had been in the store much of the time for about eight months and had free access to them, but never looked to see. He bought their entire stock at the price of \$9,000, and went in debt for two-thirds of it, without any inventory. He knew of what it consisted eight months before, but took their word alone for what they had since sold out and put in. He had no means "to speak of," as he expressed it, out of which to pay anything, except this stock. He made payment of the \$1,000, within fifteen days after his purchase out of the proceeds of his sales.

Each of these statements was his own and uncontradicted. They clearly tend to show he should have inferred, that his vendors intended by the sale to obtain a

Thacker v. The People.

position in which they could hold off creditors and so secure settlements to their own advantage. It was a question for the jury, who, in our opinion, were properly and fairly instructed, and their finding should be conclusive.

In principle the case was like those of Hanchett v. Goetz, 25 Ill. App. 445; Goetz v. Hanchett, 40 Id. 206, and Oakford & Fahnestock v. Dunlap, 63 Id. 498.

Appellant testified that the rugs included in the levy were purchased from Marshall Field & Co., and put into the stock by him after the sale in question. But he was present at the time of the levy and did not so notify the constable. He is therefore estopped to claim them now. *Goetz v. Hanchett, supra.*

Perceiving no material error in the record, the judgment will be affirmed.

Walter G. Thacker v. The People, etc.

1. APPEALS—*In Bastardy Cases.*—Appeal from judgments of the County Court in bastardy proceedings can not be taken to the Circuit Court, but should go directly to the Appellate Court.

Bastardy.—Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1896. Order affirmed. Opinion filed December 19, 1897.

ANDERSON & BELL, attorneys for appellant.

EDWARD C. KNORR, State's attorney, PEEBLES & PEEBLES, and CHARLES C. TERRY, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a complaint for bastardy, on hearing which the justice required of the defendant a bond for his appearance to the County Court. On the trial there he was found to be the father of the child, on which finding the statutory

VOL. 69.] Commissioners of Highways v. The People.

judgment was entered, and he appealed to the Circuit Court. That court, on motion of appellee, dismissed the appeal for want of jurisdiction, and for a review of that order the defendant has brought the record here.

In some cases prior to that of Lee v. The People, 140 Ill. 536, it was held that under sections 122 and 123 of the County Court Act, the appeal from that court in a bastardy proceeding lay to the Circuit Court. But in that case the court held that the provisions of that act, so far as they authorized it, were overridden, and by implication repealed by Sec. 8 of the Appellate Court Act, as amended by section 88 of the Practice Act, and exclusive jurisdiction on appeal in such a proceeding given to this court.

Subsequently, that case was overruled in Stivers v. The People, which, for some reason, has never been officially reported, though it appeared in 38 N. E. Repr. 584. But still later, we think its authority was restored by the opinions in Grier v. Cable, 159 Ill. 29 (p. 34), and Lynn v. Lynn, 160 Id. 307 (313). The order appealed from was therefore proper and will be affirmed.

The Commissioners of Highways, etc., Impleaded, etc., v. The People ex rel., etc.

1. ROADS AND BRIDGES—*Presumptions in Favor of Legality of Proceedings to Establish Road.*—Where an order of the proper authorities establishing a road is shown, the presumption is that the preliminary proceedings were regular, and such as justified the order of the court establishing the road.

2. SAME—*Use of Road for Fifteen Years Establishes Legality.*—After a road has been continuously used as a highway and recognized and maintained by the road authorities for a period of fifteen years, it becomes a lawful public highway under Sec. 1 of Chap. 121, R. S., regardless of any irregularities that may have occurred in the proceeding for its establishment.

3. SAME—*Authority of Commissioners of Highways in Regard to Repairs.*—Commissioners of highways have no right, in the exercise of a supposed discretion, to practically vacate a public highway by volun-

Commissioners of Highways v. The People.

tary neglect to repair its defects until they become irreparable, nor to determine absolutely whether a defect is irreparable, and if not so in fact, are bound to repair in such manner as they may deem best, with whatever means they may have or can control, applicable thereto in view of other and proper demands upon them. Their judgment is not authoritative or conclusive and must give way to a greater weight of evidence to the contrary.

Mandamus, to compel highway commissioners to repair a bridge.
Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

S. R. REED and A. C. EDIE, attorneys for appellants.

W. C. JOHNS, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a petition for mandamus to compel the commissioners of highways of the towns of Willow Branch in Piatt, and Whitmore in Macon counties, to repair a bridge over the Sangamon river, on the line of an alleged public highway between those towns.

It sets forth that the relators are residents of Macon county, excepting one, who resides in Piatt, and all own land in the vicinity of the bridge therein mentioned; that on January 31, 1876, the commissioners of said towns made an order locating and opening the highway described, which has ever since been maintained and used as such; that some time in 1879 the commissioners of said towns agreed that a bridge should be built over the Sangamon river, on the line of said highway, and be maintained and repaired at the joint expense of said towns, and that it was so built, and on September 3, 1879, accepted by the commissioners, and has been so maintained ever since until lately, when it has become dangerous; that for the last year the commissioners have neglected to repair it though they had means sufficient therefor; that it was unsafe and unfit for public travel and has been so declared by the commission-

VOL. 69.] Commissioners of Highways v. The People.

ers themselves; that the petitioners have requested those of both the towns to repair and maintain it, but they have refused; that those of Whitmore have levied a tax for the express purpose of meeting its share of the expenses, but those of Willow Branch refuse to levy any sum whatever for it; that both have money in their hands but refuse to use any of it for repairing the bridge; that the equalized valuation of property in Willow Branch for 1894 was \$551,024, and the levy for road and bridge purposes forty cents on the \$100; that such valuation for Whitmore was \$384,324, and the levy for road and bridge purposes was the same as in Willow Branch; and that the commissioners of that town have on hand money enough to pay and are ready to pay its just proportion of the expense for repairing said bridge.

The appellant commissioners answered, denying that they ever joined in making an order locating and opening a highway described in the petition; admitting that the alleged road is between the towns and over the Sangamon river as stated, and has been used for many years, but deny that it was lawfully opened; denying that in 1879, or at any other time, the commissioners of the two towns entered into a contract to build, maintain and repair the bridge in question at the joint expense of said towns; admitting that the bridge is unsafe and they have refused to repair it; but denying that they have funds so to do.

They say that Willow Branch is working under the road labor system, and in addition to the annual levy of forty cents on the \$100 they levied twenty cents on the \$100 under that system, and deny that they have any money that they may use for repairing said bridge or have power to make an additional levy; that said bridge can not be repaired, but a new one would be necessary and they have no money nor any authority to make a levy for such purpose; that the levy of road and bridge tax in that town for two years last past has been for the full amount allowed by law, and all was needed and used for the ordinary repairs of roads and bridges therein; that said road is not a

Commissioners of Highways v. The People.

public necessity; that they have provided ample means for the public to cross the Sangamon river, and that a bridge at the point mentioned in the petition will be a needless expense.

The answer was amended, on leave given, by setting up the statute of frauds as to the alleged contract for the building of the bridge.

On a trial by the court without a jury the finding was for the relators, a new trial denied and judgment rendered, awarding a writ of mandamus as prayed, and costs, to which exception was taken, and from it this appeal is prosecuted, in which, however, the commissioners of Whitmore do not join.

Appellants insist that the road was never lawfully established, for want of due notice of the meeting on January 31, 1876, to hear reasons for and against it, which was jurisdictional, and of the meeting on February 5, 1876, when the final order establishing the road was made, nor had the aggregate amount of damages to land owners then been ascertained.

Neither of these alleged irregularities is affirmatively shown by the record, and in the absence of such showing is not to be presumed against an order of the proper authority establishing the road. *Nealy v. Brown*, 1 Gilm. 14; *Dumoss v. Francis*, 15 Ill. 543; *Galbraith v. Leittich*, 73 Id. 209. It does not appear that any records relating to this road were kept or made by the town clerk of Willow Branch. Those of Whitmore were meager and informal, but the abstract shows one, admitted without objection, that on January 31, 1876, the commissioners of both towns met at the residence of George Peck, ten days' notice (which was all that the law required) having been given, to hear reasons for and against the petition, and having personally examined the route and heard reasons for and against it, the petition was granted and the decision publicly announced. There was then time for a five days' notice, which the law prescribed, of the meeting of February 5th, at which the final order was made, and the presumption that it was given should be

VOL. 69.] Commissioners of Highways v. The People.

indulged. The record of the filing of the surveyor's report and plat of that date was also admitted without objection shown. It appears that the agreement between the commissioners and J. R. Chambers, as to the amount of the damage to his land, and the release of damages by all the other land owners, so far as known to the petitioners for the road, bore date of August 14, 1876, but it is not improbable that they were all ascertained and agreed on at the meeting of January 31st.

The proof is that the bridge was built by K. N. Hankins, under a verbal agreement with the commissioners made July 19, 1879, and the grading done by the same party under a like agreement of September 20th. If these agreements should have been in writing, as appellants say the law required, they were nevertheless fully executed on both sides. The bridge was accepted on September 3, 1879, and soon afterward paid for in full by the commissioners. It is therefore too late for their successors to object on the ground suggested.

Moreover, whatever irregularities may have intervened in the proceedings for the establishment of the highway under the State, it is proved and admitted, that from the time the bridge was built, it has been continuously and largely used by the public as a highway, worked by the road authorities of both the towns, maintained at their joint expense and never lawfully vacated. By virtue of such use and recognition for a period of more than fifteen years, it became a lawful public highway under the first section of Ch. 121 of the Revised Statutes.

Commissioners should not be allowed, in the exercise of a supposed discretion, to vacate, in effect, a public highway, by voluntary neglect to repair its defects until they become irreparable. They have no such discretion, nor any power to determine absolutely whether a defect is irreparable; but, if not so in fact, are bound to repair, though in such manner as they may deem best, with whatever means they have or can control that are applicable thereto in view of other and proper demands upon them. Their judgment

Commissioners of Highways v. The People.

that this bridge could not be repaired, but that if any was required at that place it must be a new one, of iron, and to cost twelve or thirteen thousand dollars, or any other sum, was not authoritative or conclusive, but only matter of evidence which must give way to that of a greater weight to the contrary, which the court seems to have found in the opinion of expert bridge-builders, and of contractors willing and ready to engage to make it substantial and reasonably durable, for all the purposes of a bridge, for a sum ranging from seven to eleven hundred dollars, according to the plan adopted and material used.

We are referred by counsel to the case of *The People v. Commissioners of Highways*, 32 App. 169—in which this court held substantially that the appellees could not be compelled by mandamus, against their judgment, to build a bridge in place of one that had been destroyed, over a stream which crossed the line of the highway—as being exactly parallel with this. We think the difference is that between compelling action in some way to a particular end and action in a particular way to that end—a distinction plainly attempted to be shown in that case, and very material where the respondents, as there and here, had a discretion in respect to the particular action to be taken. Here it is to “repair” in some way an existing but defective structure; there it was to provide one not then existing, and of a particular kind prescribed by the court, which was, therefore, in our judgment not within the legal scope of the writ.

The court below, in this case, conforming to the prayer of the petition awarded a writ commanding the respondents to proceed in the performance of their duty to repair the bridge, and does not interfere with or attempt, as is alleged, to control their discretion in respect to the time, means or manner of such repair.

Upon the question whether they have on hand or within their reach money enough to meet the necessary cost of such repair, the evidence may not be very clear. It appears that the town of Whitmore, with a smaller valuation of property, levied the same percentage of tax for the express purpose of

including enough to pay its proportion—one-half—of such cost and so have obtained enough, and are ready to pay it. Respondents called to testify admit that they have funds on hand for the ordinary repair of highways and bridges, without giving the amount, and say they are of opinion that when other needed repairs of the highways and small bridges in the town, and which they intend to make, shall be paid for, there will not remain enough for the purpose in question. But they do not state the estimated or probable amount of the cost of such other repairs, nor show that they have not the power by means provided by law to obtain the amount required for its share of the cost of the repairs here sought, before it will become due. It seems clear that for a year before this petition was filed they neglected to use the means they lawfully might to raise money for the repair of this bridge and intended not to repair it, but leave the people to cross the river by other bridges until a new and far more costly one should be built on the line of this highway. In so doing they mistook their duty and the extent of their discretion. The case of this bridge was as clearly within the description of "ordinary repairs" as that of any of the smaller bridges, and for aught that appears, quite as important and urgent. Knowing that it had become unsafe they should have taken measures promptly to make it safe.

We do not see that upon the point of present financial ability to repair it the finding of the court was manifestly against the weight of the evidence, or that it erred materially in any other particular. Its judgment will therefore be affirmed.

Charles M. Holt v. Tennent-Stribling Shoe Co.

1. EVIDENCE—*Of Corporate Existence.*—Evidence that a plaintiff, suing as a corporation, carried on its business as such under the management of persons acting and recognized as a board of directors, president, secretary and treasurer and issued stock; and that the defendant, in communications both verbal and written in respect to the matter in controversy, so treated it, is competent to prove it a corporation *de facto*, which is all that is required to meet a plea of *nul tiel corporation*.

Holt v. Tennent-Stribling Shoe Co.

2. COLLECTION AGENTS—*Liability for Acts of Correspondents.*—A collection agent undertook the collection of a claim for ten per cent of the amount collected and forwarded it to his correspondent at the residence of the debtor. The correspondent collected the claim, retained about forty per cent and soon after absconded. In a suit for the excess of charges above ten per cent the defendant offered to prove that the charges were reasonable and that his correspondent had been a man of good reputation. *Held*, inadmissible.

Assumpsit, on the common counts. Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 19, 1896.

L. E. EMMONS and SAMUEL WOODS, attorneys for appellant.

GEORGE M. JANES, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellant carried on at Quincy, Ill., in his own name alone, an agency for the collection of past-due claims in all parts of the United States and Canada. Appellee, doing business in St. Louis, Mo., had a claim for \$250 against one Jacob Sloop, who had been a merchant at Queen City, Schuyler Co., Mo., but had somewhat suddenly sold out and gone to Idaho. On March 22, 1893, George Schultheis, its traveling salesman and one of its stockholders, who resided at Quincy, and for some years had known appellant and of his business, placed this claim in his hands for collection and took a receipt to the company therefor as follows:

GEM CITY COLLECTING AGENCY,

C. M. HOLT, Attorney & Manager.

Room 6 Ricker Nat. Bank, Telephone 76.

For the protection of Merchants and Manufacturers and the collection of past due claims. Collections made throughout the United States and Canada.

QUINCY, ILL., March 22, 1893.

Tennant-Stribling Shoe Co., St. Louis, Mo.

GENTLEMEN: Your Mr. Schultheis left with me this A. M. for collection an account of two hundred and fifty dollars

VOL. 69.]Holt v. Tennent-Stribling Shoe Co.

against Jacob Sloop, Queen City, Mo. This claim shall have attention. I shall keep you advised. Yours truly,

C. M. HOLT."

Appellant promptly sent the claim to an attorney at Kirksville, some eighteen miles from Queen City, who attended to his business in that part of the state. He proceeded to Queen City, where he learned that Sloop had left notes for collection in the Hayes Banking Co., and thereupon commenced a suit in attachment before a justice of the peace. On being notified of this proceeding Sloop immediately wrote to the bank directing payment of the claim, which was accordingly made on April 20th, through the justice to the attorney, amounting to \$254.57. About three weeks afterward the latter remitted to appellant \$165.40, but never any more, though pressed to do so, and later went to the farther west. Immediately upon its receipt appellant sent to appellee \$160. For the balance claimed to be due on account of the collection, which he refused to pay, appellee brought this suit in assumpsit against him on the common count for money had and received. The pleas were non-assumpsit, *nul tiel corporation* and set-off, on which issues were joined and a trial had, resulting in a verdict for plaintiff for \$69.09, and judgment thereon, after a motion for a new trial, overruled. Defendant brought the record here by appeal.

Appellee's name indicated a corporation. Oral testimony was admitted over objection, to show that it carried on its business as such, under the management of persons acting and recognized as a board of directors, president, secretary and treasurer, and issued stock; and that appellant, in all his communications with it respecting this claim, verbal and written, until this suit was commenced, so treated it. This testimony was not contradicted, and was competent to prove it a corporation *de facto*, which was all that was required in this action to meet the plea denying its corporate existence. *Walker Paint Co. v. Ruggles*, 48 Ill. App. 406, and cases cited.

The questions on the merits were, who was responsible

Holt v. Tennent-Stribling Shoe Co.

to appellee, and how much, if anything, remained due to it, on account of the collection made. Appellant contends that he discharged his full duty in the premises by sending the claim to a competent and reputable attorney named and not objected to, with such information and advice respecting it as he was able to give, and faithfully accounting for all that he actually received on it; and that if responsible he is entitled to set off or recoup the reasonable expenses incurred, and value of the services rendered in the case. Appellee insists that he undertook to make the collection himself, by whatever means or agents he should see fit to use, and for an agreed compensation of ten per cent of the amount collected.

When Schultheis left the claim with appellant no one else was present. They alone have personal knowledge of the contract. Schultheis distinctly and positively testified that as to compensation the agreement was for ten per cent, and appellant, as positively, that no terms by which the amount could be fixed were stated.

That Holt was the agent of the appellee there seems to be no reason from the evidence to doubt. His business, as advertised by himself, was to make collections in all of the United States and Canada, and his office was in Illinois. His method was not to go abroad to make them, but to act by correspondents or agents. In his letter remitting to appellee he spoke of Porter as "my correspondent," and in another as "my local attorney." He told Schultheis that he would not go in person to Queen City, as desired, but had a man, Porter, who attended to his business in that region, and would attend to this for him. He gave directions to and received the remittance from him, and went to Kirksville to see him about the balance and pressed him for its payment. Neither Schultheis nor any officer of the company ever knew him or had any communication with or from him. These circumstances are ample proof that there was never any direct relation between him and appellee, and that appellant always regarded him as his agent.

Depositions of the president and secretary of the com-

VOL. 69.]Holt v. Tennent-Stribling Shoe Co.

pany, and of the justice at Queen City, to the same point, were admitted over objection by appellant, who moved to suppress them for supposed defects in the commissions and in the certificates of the commissioners, which were purely technical, and in our judgment too plainly untenable to call for special notice. Besides, they added nothing to the abundant proof made by other evidence received without objection. Indeed the appellant himself did not deny the fact, but claimed exemption from responsibility for Porter's default on another ground.

It appears that the claim was sent by appellant to Porter on the day it was received, March 22, 1895, with directions to go to Queen City and work up assets of Sloop. On his return to Kirksville he wrote to appellant under date of the 25th, giving particulars of his inquiries and the results, showing a poor prospect of collection, and stating that he could discover nothing out of which to make it without "taking in" another party, who would not give the information unless they were allowed forty per cent of the claim. This letter was given to Schultheis about April 1st, to be sent to the company, and was so sent and returned in a letter of the president, of April 3d, of which the abstract shows only the following: "From the way Porter writes we judge Sloop a rascal. We will leave matters with you to do your best. We fear Sloop will not send us collaterals. We think we will wait and see if Sloop sends note before taking steps to force collection. We return the Porter letter."

Schultheis testified that when this letter was shown to him he said to appellant, "the house will not stand such charges; wire your man at once," and that appellant replied, "he will not change my terms, they are pinned to every claim sent out; they are ten per cent." And further, that when he returned the letter he told appellant that they left the matter to him (Schultheis). From the dates given, the lack of needed information and the president's letter, it was evident that all this occurred a week or longer before the attachment suit was brought, or it was known that any suit would be brought.

McPherson v. James.

The “party” referred to by Porter was Barney Dysert, cashier of the Hayes Banking Co., who testified that Porter proposed, for the information sought, to “divide fees” with him, but he asked twelve and a half per cent of the amount collected, which Porter paid. He said nothing about forty.

It is not claimed that the company or Schultheis expressly authorized any such payment. Appellant says he gave no instructions to Porter in answer to his letter, because he had himself received none from appellee or Schultheis. According to the latter’s statement, he told appellant, when he returned the Porter letter, that “the company left the matter of the collection in his (Schultheis’) hands,” and he had already instructed him most emphatically on that point. Appellant denied this. But however that may be, we think the weight of the evidence shows that he understood the conduct of Porter, in regard to the residue not remitted, as wholly unauthorized and wrongful. The propriety of the verdict can not be doubted if appellant undertook the collection for ten per cent of the amount collected. For in that case, the reputation of Porter and the reasonable value of the services rendered in the course of collection would be wholly immaterial. It was for the jury to determine that question upon the conflicting testimony of Schultheis and the appellant. They appear to have believed Schultheis; and perceiving no material error on the part of the court, the judgment will be affirmed.

Hezekiah McPherson v. Joseph A. James.

1. DOMESTIC ANIMALS—*Running at Large—Turkeys Not Included*—The act of June 21, 1895, against domestic animals running at large, declares it unlawful for certain species of domestic animals to run at large, and imposes a penalty upon the owners for permitting it, but it does not by any specific or general terms include turkeys.

2. TRESPASS—*By Domestic Animals*.—Every domestic animal, by going on any premises, fenced or unfenced, without the consent of the

owner, is a trespasser. The owner of premises is not bound to fence against such animals and may lawfully omit to do so.

3. *SAME—Constraint of Animals Trespassing—Damages.*—The owner of premises upon which trespasses are committed by domestic animals, may take up such animals and hold them for the payment of the damages done by them while so trespassing, but he will be entitled to no more than the actual damages and reasonable charges for keeping and feeding them.

4. *TENDER—Of Damages by Domestic Animals Trespassing.*—A tender of an amount for damages done by domestic animals distrained for trespassing, if sufficient, instantly extinguishes the lien of the owner of the premises upon such animals, and his keeping and feeding them, after such tender, is unauthorized.

5. *SAME—Effect of a Withdrawal of.*—The effect of a tender by the owner of domestic animals distrained for damages done by them, in trespassing upon the premises of another, is not defeated by a failure to keep such tender good. *Dunbar v. De Boer*, 44 Ill. App. 615.

Trespass, animals damage feasant. Appeal from the County Court of Hancock County; the Hon. DAVID E. MACK, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

O'HARRA, SCOFIELD & HARTZELL, attorneys for appellant.

SHARP & BERRY BROTHERS, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

The farms of the parties were separated by a public highway. Through openings in appellee's hedge, large enough to permit the passage of hogs, a flock of turkeys belonging to appellant got upon his premises and destroyed some apples and corn. Finding them there appellee shut them in his barn and held them for damages. Appellant offered him one dollar and demanded his turkeys. Appellee refused, demanding twelve. Appellant then tendered him five, which he also refused. Appellant placed that sum in the hands of a mutual friend, requesting him to offer, and if appellee should consent during the day to accept it and let the turkeys go, to give it to him. That offer, made accord-

McPherson v. James.

ingly and with friendly advice to accept it and have no trouble between neighbors, he also refused at first; but on the next or subsequent day called on the friend and expressed his willingness to accept it, when he was informed that appellant had withdrawn the money. Thereupon he brought this action before a justice of the peace. On appeal taken to the County Court, it was tried by a jury, who returned the following verdict: "We, the jury, find the issue for the plaintiff and assess the damage at twenty cents (20c), and the feed and care of the same at twelve dollars and ninety cents (\$12.90)." The court overruled a motion for a new trial, and rendered judgment on the verdict, without amendment as to its form, for \$13.10 and costs, from which judgment this appeal was taken.

The case has been argued for appellant at considerable length, as one involving a new and important question, but it is not deemed necessary here and now to review particularly the statutes and decisions from Seeley v. Peters, in 5 Gilman, to date, relating to fences and trespasses by domestic animals.

We know of no law absolutely requiring owners of turkeys to fence them in or others to fence them out. Our statute declares it unlawful for certain species of domestic animals named to run at large and imposes a penalty upon their owner for permitting it, but does not, by any specific or general term, include turkeys. Laws of 1895, p. 4. Their owner may therefore allow them to run at large without subjecting himself to any penalty; whether he is also exempt from liability for actual damages they do upon the premises of another, is a different question.

We understand that every domestic animal, by going on any premises, fenced or unfenced, without the consent of the owner, expressed or implied, becomes a trespasser. He is not bound to fence against any such animal, but may lawfully omit to do so. Bulpet v. Matthews, 145 Ill. 345. Domestic fowl is an animal. State v. Bruner, 111 Ind. 98.

Appellee was entitled to damages, notwithstanding the defects in his hedge, and to hold the turkeys for payment. But he was entitled to no more than the actual damages

VOL. 69.]

Tribbetts v. Huston.

and reasonable charges for keeping and feeding them. It is entirely clear from the evidence that at the time of the tender shown, the sum of these was considerably less than the amount tendered. The court instructed the jury that he was entitled to charge for keeping and feeding up to the time of the verdict. The tender instantly extinguished his lien and his keeping or feeding from that time were unauthorized and wrongful. This effect was not defeated by appellant's failure, if he did fail, to keep his tender good. Am. and Eng. Ency. of Law, Vol. 25, p. 927; Waite's Actions and Defenses, Vol. 7, p. 595.

The instructions were erroneous, and the verdict against the law and the evidence. The judgment will therefore be reversed and the cause remanded.

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Nancy Tribbetts v. Albert M. Huston.

1. **REAL ESTATE—Liability for Cost of Improvements as Between Tenant for Life and Remainderman.**—As between a tenant of real estate for life and the remainderman, the tenant for life must pay in full the regular annual taxes, insurance if necessary, and ordinary repairs, but the expense of a permanent improvement that enhances the value of both the life estate and the remainder should be apportioned between the tenant for life and the remainderman, in proportion to their respective interests.

Assumpsit, against a tenant for life, for drainage district assessments paid by the remainderman. Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

BLINN & HARRIS, attorneys for appellant.

A. G. JONES and **BEACH & HODNETT**, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

In 1893 a special drainage district was regularly organ-

Tribbetts v. Huston.

ized in Logan county and commissioners appointed, who proceeded to excavate a ditch to cost \$20,000, and to be paid for by assessment under the statute upon the lands of the district. It was divided into five annual payments of one-fifth of that sum, with interest on the deferred payments in each year. Appellant, sixty-eight years of age, owns a life estate in a tract of one hundred and sixty acres, worth \$8,000, in that district, and appellee the remainder in fee. The assessment against it was \$1,500, divided as above stated. For the year 1895 the amount due on it in May was \$343.19. Neither of the parties paid it, and the land was sold therefor by the collector of the county. In November, 1895, appellee redeemed it by paying the sum so due, together with the penalty imposed by the statute, making the total amount \$439.34, and thereupon brought this suit to recover it.

The case was tried by the court upon a stipulation of the facts as above stated and the further fact that the ditch was a permanent improvement that enhanced the value of both the life estate and the remainder, upon which the court found for the plaintiff and rendered judgment for the full amount claimed. Defendant excepted thereto and prayed this appeal.

Appellant does not deny her liability for her equitable portion of the assessment as tenant for life, but insists that to charge her for the whole of it and the penalty is unjust and unlawful.

We understand the rule to be that the tenant for life is bound by that interest to pay in full the regular annual taxes, insurance, where the subject of the tenancy is of a character that calls for insurance, and ordinary repairs, all of which are "incidental" charges upon the subject of the tenancy, and inure, substantially to their full amount, to the benefit of such tenant. Special assessments made by public authority and without regard to the will of the tenant, for permanent improvements inuring as well to the remainder in fee, are not such taxes, but are clearly distinguished on grounds materially affecting the liability therefor of the

VOL. 69.]Tribbetts v. Huston.

several estates respectively. I. C. R. R. Co. v. The City of Decatur, 126 Ill. 92, and authorities there cited.

It is equally clear that such improvements are not necessarily "incidental" to the life estate, and that the big ditch in this case—forty feet wide and seven deep—can not be classed with "ordinary repairs."

Besides regular "taxes," properly so-called, current insurance where the property is of a kind calling for it (which is certainly not the case here), and ordinary incidental repairs, we know of no charges for which the life estate is wholly responsible. If it were, that estate, by reason of its liability to determination at any time, might not be of sufficient value to meet them. They are therefore chargeable upon the property which is permanently benefited, and the owners of the several estates therein should be held to pay only in proportion to their interests respectively. Plympton v. Boston Dispensary, 106 Mass. 546; Carm v. Shebert, 3 Edw. Chy. 312; Peck v. Sherwood, 56 N. Y. 615. No authority to the contrary has been brought to our attention.

If permanent improvements made by special assessments have in some cases been held to be "incidental" to the life tenancy, as street paving is said to have been in White v. The Mayor, etc., 2 Swan (Tenn.) 364, it would not follow that the entire assessment therefor should fall upon that estate. That must depend upon the permanency of the improvement and its effect upon the remainder. In Peyton v. Jeffries, cited by appellee, the court, on p. 149, declaring the rule to be that tenant for life is liable "for all the taxes" assessed, holds that the dowress, standing in the place of her husband, is subjected, like other tenants for life, to the "charges, duties and services to which the estate may be liable, in proportion, certainly, to her interest therein"—citing the Tennessee case and 2 Schribner on Dower, 733. Warren v. Warren, 148 Ill. 641, confidently claimed to be conclusive for appellee, we think is to the same effect. There the tenant did not hold as dowress nor otherwise by operation of law, but under her husband's will, which directs the trustee thereby appointed, who was his

Tribbetts v. Huston.

son by a former wife, to hold and keep his estate intact during his (the trustee's) natural life, and after providing for the payment of debts and funeral expenses out of the personal property, proceeds as follows:

"I direct that the annual income of my estate, personal and real, shall be used as follows: My executor and trustee shall be entitled to and shall receive a reasonable compensation for his services. The annual taxes and insurance, and also all reasonable repairs and improvements, shall be provided for out of the annual rents and interest, and of the annual income not used for the purposes above named one third shall belong to my wife, Eliza A. Warren, during her natural life, and also a suitable house for her residence during the same period. And my wife, Eliza A. Warren, shall not be required to pay rent for the use of the residence that she shall occupy." * * * The improvements in question were street paving and sewers in the city of Rockford, where was her residence and the other real estate referred to, and were made by special assessment. She complained that she was charged for one-third of the assessment and claimed that she was not chargeable for any of it. The Circuit Court held with her on that point, but the Supreme Court held otherwise, and reversed the decree to that extent only, holding that she or her estate was chargeable "in proportion to her interest." There she made it a question between liability and non-liability.

Here it is between liability for the entire assessment or only for an equitable proportion. Appellant's expectancy of life exceeds but a little the period within which all of the installments will become due. If she is chargeable for the entire amount of the first, she will, if she lives and retains her interest, for the same reason be liable for all the others, and that would amount practically to a confiscation *pro tanto*, and probably in this case, completely, of the particular estate for benefits inuring to the remainder.

In our opinion that is neither lawful nor just. The judgment will be reversed and the cause remanded that the Circuit Court may ascertain her just proportion and give judgment for no more. Reversed and remanded.

VOL. 69.] Board of Supervisors v. Commissioners of Highways.

Board of Supervisors v. Commissioners of Highways.

1. **BRIDGES—When and How Townships May Secure Aid in Constructing.**—The circumstances under which, and the method by which, townships may secure aid in the construction of bridges are specifically prescribed by statute (R. S., Ch. 121, Sec. 19), and there is no other way. The statute requires that the commissioners of highways present a petition setting forth certain prescribed facts, which are all alike essential to the right. When all the prescribed facts are made to appear by the petition the supervisors must act, but until this is done they are not bound or empowered to apply county funds to such use.

Mandamus.—Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

J. MEEKER, State's attorney, and R. M. PEADRO, attorneys for appellant.

W. G. COCHRAN and W. P. GUTHRIE, attorneys for appellees.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was a petition by the commissioners for a writ of mandamus to compel the board of supervisors to make appropriations in aid of the construction of two bridges over streams in their township and in the line of a public highway, to the amount of \$1,250, being one-half of the estimated cost of said bridges.

To the petition is attached and made part thereof what it alleges to be a copy of the petition presented by them to the board of supervisors for the aid sought. On demurrer thereto sustained it was amended in some particulars, but as amended did not include a copy of the petition to the board or otherwise show its contents. In respect to that petition it avers only that on September 11, 1895, they did "present to the board of supervisors of said county, then in

Board of Supervisors v. Commissioners of Highways.

regular session, a petition in pursuance with law asking said board of supervisors to make an appropriation to the amount of \$1,250, one-half of the amount necessary to build said bridges; that said supervisors then and there refused," etc.

The board filed an answer averring that no petition was ever presented to them by the commissioners, by which it was made known, or to appear, that the levy for the road and bridge tax for two years last past in the township was in each year for the full amount of forty cents on the \$100, allowed by law for the commissioners to raise, the major part of which was needed for ordinary repairs of roads and bridges; and that no knowledge, information or evidence whatever, other than that shown by and contained in the petition that was presented, which they are ready to produce in court, and a copy of which is attached as an exhibit to the answer and made part thereof—was made manifest, given or produced by the said commissioners to said supervisors.

The copy so attached is a duplicate of the alleged copy attached to the original petition herein.

On motion of petitioners the court ordered that the answer be stricken from the files, to which order respondents excepted, and making no further or other answer, judgment was rendered against them and the writ awarded as prayed; and having excepted to it also they took this appeal.

How the aid here sought may be obtained is specifically prescribed by the statute (R. S., Ch. 121, Sec. 19), and hence there is no other way. It is by petition of the commissioners presented to the supervisors, if in session, or their chairman if not, setting forth certain prescribed facts which would show that the township needs and deserves it. They are all alike essential to the right. The legislature has not classified them according to any supposed relative importance. If any one may be omitted so may any other. When all are made to appear by the petition the supervisors must act—make the appropriation, or refuse at the peril of coercion by mandamus. But until so made to appear, we

VOL. 69.] Board of Supervisors v. Commissioners of Highways.

apprehend they are not bound nor empowered to apply county funds to such use.

Among these facts is "that the levy of the road and bridge tax for the two years last past in the town was in each year for the full amount of forty cents on each one hundred dollars allowed by law for the commissioners to raise," the plain purpose of which was to show that the town was not in fault for its need of the aid asked.

This was not alleged, nor even inferentially shown in the petition presented to the supervisors, as certainly appeared by the copy exhibited with the original petition herein. Its omission was one of the stated causes for the demurrer sustained thereto. The amended petition—which was rather a substitute—sought to evade this objection arising on the face of the original, by leaving off the copy so exhibited, and making the omitted allegation for the first time in the amended petition to the court. This was a confession of the defect in the original and of its materiality. But since it did not affirmatively appear in it as amended, the respondents were required to answer or plead.

Their answer denied that the petition to the supervisors in any manner showed the road and bridge tax for two years then last past in the town was in each forty cents on each \$100, or that they had any knowledge, information or evidence in relation to it other than was contained in or given by the petition, making profert of the one they did present and attaching a copy thereof, which was a duplicate of the one attached to the original petition herein.

It is contended for the commissioners that with the averment in the amended petition herein a case was made which entitled them to the aid sought. But whether so or not, is not the question here. As an original application to the court, if the court could entertain it as such, it might be sufficient. But the court had no power to grant it. The board of supervisors alone could make the appropriation. The court could compel them to make it if they refused to do so upon a proper showing and request to them. So that the question here is whether the petition to the court showed a proper

L. C. R. R. Co. v. Leggett.

case and request first made to the supervisors. If not, they are not in default as to any duty in the premises, and therefore not liable to a mandamus.

The answer averred that the case so made to the board was not such, and clearly stated wherein it was claimed to be insufficient. We think it was a good answer; but if not, having been filed regularly, and being in no sense scandalous or offensive to decency, upon what legal ground or idea it was stricken from the files without opportunity given either to defend or to amend it, we are at a loss to understand. For the error in so doing the judgment will be reversed and the cause remanded.

69	34
112	42

Illinois Central Railroad Company v. James F. Leggett.

1. **WITNESSES—Employes—Credibility of.**—In the absence of all proof of bias or prejudice resulting from their employment, an instruction to the effect that if the jury believe, from the evidence, that any employe has testified under a fear of losing his employment, or a desire to avoid censure, or a fear of offending, or a desire to please his employer, they may take such circumstances into consideration in weighing the evidence, is erroneous.

Trespass on the Case, for killing a horse. Appeal from the County Court of DeWitt County; the Hon. GEORGE K. INGHAM, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

WILLIAMS & CAPEN and FRED BALL, attorneys for appellant.

CHAS. R. ADAIR, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Case, against appellant, for loss of a horse alleged to have gotten on its right of way through an insufficient fence and

VOL. 69.]I. C. R. R. Co. v. Leggett.

to have been killed by its train. Verdict for plaintiff for \$90 damages and \$25 for attorney's fees. Motion for a new trial overruled, judgment on verdict and appeal by defendant.

The line of the track was north and south. Two pasture lots, next west, were divided by a poor fence, in which was a gate often left open by trespassers and found open on the morning of the accident. There was a wire fence on the west side of the south pasture, in which the horse was kept, that appellant claimed was good and sufficient. That on the same side of the north pasture was of posts and boards, which appellee claimed was by no means sufficient. Neither of these claims, however, was conceded. The principal dispute was whether the horse escaped through the board fence as claimed by appellee, or through the wire fence, as claimed by appellant; and upon all, as well as that of negligence or due care on the part of appellant with reference to the fences, the evidence was more or less conflicting.

The court gave, among others, the following instruction : " If the jury believe from the evidence that any witness has testified under a fear of losing his employment, or a desire to avoid censure, or a fear of offending, or a desire to please his employer, then such fact may be taken into account by the jury in determining the degree of weight which ought to be given to the testimony of such witness. And in such case the jury have a right to judge of the effect, if any, likely to be produced upon the human mind by such feelings or motives, and how far such feelings or motives on the part of a witness may tend to warp his judgment or pervert the truth. And the jury, after applying their own knowledge of human nature and of the philosophy of the human mind to the investigation of the subject, are to judge of the weight which ought to be given to the testimony of such witness, taking the same in connection with all other evidence in the case."

Here is singled out a particular relation—that of employe as affecting the credit of a witness—which, in this case, applies only to those called for appellant, while the evidence shows another on the other side—that of parent—which is

Carlisle Shoe Co. v. Bailey.

not noticed. Were the jury to infer, from its omission, that the law recognizes some natural tendency to bias in an employe but none whatever in a father?

The main objection to the instruction, however, is the entire lack of evidence that any employe did testify under any of the fears or desires indicated in it. The fact that they were employes was not, of itself, such evidence. C., R. I. & P. R. R. Co. v. Givens, 18 App. 408. That fact was not stated hypothetically, but assumed, and properly so, because it was admitted. The court did not say or mean "if you believe" that fact you may consider it as tending to prove they so testified, for there was no "if" about it; but "if you believe from the evidence," as though there was some such "evidence," which the jury might or might not "believe." There was none. The instruction was, therefore, erroneous, and affecting alike, as it did, nearly all of appellant's witnesses, materially harmful. See C. & N. W. Ry. Co. v. Stube, 15 App. 39; St. L., A. & T. H. Ry. Co. v. Higgins, 20 Id. 639. For that error the judgment will be reversed and the cause remanded. Some others are complained of, but as they are not likely to be repeated on another trial, need not be here particularly noticed. Reversed and remanded.

69 3
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**Carlisle Shoe Co., Impleaded, etc., v. Harry V. Bailey,
Coroner, etc., for Use of, etc.**

1. **BONDS—Execution of, by Agent—*Descriptio Personae*.**—A person signed a replevin bond in his individual capacity; in the body of the bond his name appeared as "agent for and acting on behalf of the Carlisle Shoe Company (incorporated) as principal;" in an action on the bond by the defendant in the replevin suit, it was held that the bond was not the obligation of the Shoe Company, but that of the person signing it, and that the words "agent for and acting on behalf of the Carlisle Shoe Company" were a *descriptio personae* and surplusage.

Debt, on a replevin bond. Appeal from the Circuit Court of Tazewell County; the Hon. NATHANIEL W. GREEN, Judge, presiding. Heard in

this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

Wm. S. KELLOGG, attorney for appellant.

T. N. GREEN, attorney for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Debt on a replevin bond taken by the coroner, against the shoe company (incorporated) and the Farmers National Bank of Pekin, alleging breaches by the company in failing to prosecute its suit with effect, and to make return of the property replevied. Among others, were filed pleas of *non est factum*, *nul tiel record*, and that the replevin suit was dismissed by the plaintiff therein without a trial or any determination of the merits, and that the goods replevied were the property of said plaintiff. The verdict was for the plaintiff in this action for \$1,609.60 debt, and \$596.31 damages. A new trial was denied, and judgment rendered upon the verdict. Defendant, the shoe company, appealed.

The bond was declared on as the writing obligatory of the defendants, and the one offered in evidence was as follows:

"Know all men by these presents, that we, N. C. Broner, agent for and acting on behalf of Carlisle Shoe Company (incorporated), as principal, and Farmers National Bank, of Pekin, Illinois, a corporation, as surety, are firmly bound unto Harry V. Bailey, coroner of Tazewell county, in the State of Illinois, and to his successors in office, executors, administrators and assigns, in the penal sum of \$1,609.61, lawful money of the United States; for the payment of which sum we do hereby jointly and severally bind ourselves, our heirs, executors and administrators." Then follows a recital of the institution of a replevin suit by the shoe company against the sheriff of Tazewell county for the recovery of the goods described, and the conditions of the obligation, all in the usual form; and its conclusion is as follows:

Carlisle Shoe Co. v. Bailey.

“Witness our hands and seals, this fifteenth day of September, A. D. 1894.

Signed, sealed and delivered in the presence of

N. C. BROUER, [L. S.]

FARMERS NATIONAL BANK, [L. S.]

By C. H. Turner, Cashier.”

It was objected to as variant from the one declared on, and not the bond of the shoe company; but the objection was overruled, and the instrument admitted and read to the jury; to which ruling exception was taken.

The goods in controversy having been sold and delivered by the company to Wm. H. Stetson, were seized by the sheriff as the property of Stetson, under an execution against him in favor of Selz, Schwab & Co., and replevied by the vendor on a claim of fraud on the part of his vendee in the purchase. The mass of the evidence offered and instructions asked on the trial had reference to the alleged fraud. In view of further proceedings, we deem it unnecessary, if not improper, to say more than that we perceive no material error of the court on that branch of the case.

But we hold that the bond offered should not have been admitted over the objection interposed. It did not on its face purport to be the bond of appellant, but of “some one else on its behalf,” as was expressly authorized by the statute. Rev. Stat., Ch. 119, Sec. 10. N. C. Brouer was, in its body, declared to be the principal obligor, and executed it not in a representative character, but in his own name, as on his own responsibility. Doubtless he was, in fact, the agent of the company to look after its claim for it, but it would not follow from that, nor was it otherwise shown, that he was authorized or undertook to bind it by an instrument under seal. Had he attempted or intended so to do, he should, and presumably would, have signed it in the name of the company, as Turner signed that of the bank. The words “agent for and acting on behalf of Carlisle Shoe Company,” were a *descriptio personæ*, and surplusage. Powers v. Briggs, 79 Ill. 493, and cases cited.

Nor is appellant bound by ratification of Brouer’s act,

VOL. 69.]Tinsley v. Scott.

though it may have received the benefit of it, because it was not done in the name of appellant, but in his own. Mr. Turner, called as a witness for appellee, testified that he also signed it "for and on behalf of the Carlisle Shoe Company, but it would not be claimed that the company is liable to appellee on that act of the bank, by ratification of it.

Nor can it be urged that this view would work any injury to appellee or the party for whose use this action was brought. Such a position assumes, without proof, that Brouer's bond is not as good security as would be that of the shoe company. And if it is not, the company is in no way responsible for the fact. Appellee took Brouer's bond, and must look to him for satisfaction, so far as the bond is concerned.

For error in admitting the bond in evidence against appellant, the judgment will be reversed and the cause remanded.

J. M. Tinsley v. J. A. and A. R. Scott.

1. **BROKERS—When Entitled to Commissions on a Sale of Property.**—Of several brokers, under employment at the same time, the one who first produces a customer is entitled to the commission. But the party presented must be a customer or client of his own, and not one sustaining that relation to another broker under like employment. And a prospective customer does not continue to sustain that relation after the negotiations are expressly broken off, or the matter of the purchase has ceased to be held under consideration by him.

Transcript, from a justice of the peace. Appeal from the County Court of Champaign County; the Hon. CALVIN C. STALEY, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

GULICK & GULICK and J. L. RAY, attorneys for appellant.

WOLFE & SAVAGE, attorneys for appellees.

Tinsley v. Scott.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellees brought this action before a justice of the peace to recover commissions, as real estate brokers, on the sale of appellant's farm. On appeal to the County Court there was a trial by jury, a verdict for plaintiff, a motion for a new trial denied and judgment on the verdict for \$80 and costs, to reverse which this appeal is prosecuted.

Early in June, 1895, appellant, then a practicing physician in Champaign, who a few months afterward removed to Canton, Mississippi, called at appellee's office and placed in their hands for sale his farm of eighty acres near Bondville. The price given was \$85 per acre with, or \$80 without, his share of the crop, and the commission to be paid was one dollar per acre. Within a few days thereafter Mr. William Birch, who was looking for a farm, called to see what they had for sale. They showed him their list, gave him some description and the price of appellant's land, telephoned to appellant to call, and introduced Mr. Birch as a gentleman who wanted to talk with him about buying it. Immediately after their conversation, appellee A. R. Scott rode out to appellant's farm with Birch, who, upon such examination as he then made, said he would not take it at the price given. Scott then drove with him a mile south and showed him another farm, known as the widow Dale farm, which he purchased three days thereafter. Scott testified: "I saw Tinsley that evening (the evening of the day he took Birch to see his farm) and told him that Birch would not take the farm at that price. I did not afterward make any effort to consummate the sale between Tinsley and Birch; I did not try to get Tinsley to take less, or induce Birch to come to Tinsley's terms; I did not sell Tinsley's land to Birch or any one else." His brother and co-appellee testified to the same effect, and neither intimated that they ever made any further effort to sell it to anybody, or knew of any person who proposed or wished to purchase it on any terms, until it was sold. About the middle of July, Birch met appellant for the first time since the

meeting in appellee's office, and after telling him that he had bought a farm near his, said he would like to rent appellant's, who replied that he didn't care to change tenants, but would sell the land to him. Birch did not intimate that he would like to purchase it.

Some time in the fall, for reasons not shown, Birch sold his widow Dale farm through J. B. McKee, another broker in Champaign, to whom and two others appellant had given his farm for sale and so informed appellees when he gave it to them. When Birch went to his office to execute the deed McKee asked him why he didn't buy the Tinsley farm, to which he answered that he wouldn't give as much as was asked for it. Then McKee told him he thought it could be bought for less than \$50, and asked him to make an offer; which he finally did, of \$76 per acre, with payment in part by a mortgage note of \$2,500 of another party. This offer, when reported to Tinsley, was at first refused, but McKee got the parties together, and after some time it was accepted and the sale made accordingly. Tinsley paid McKee his commission. Shortly after the sale appellees learned that it had been made, and for less than the price given them. A. J. Scott says that on his return from a trip in Iowa, about the last of October or first of November, he met appellant on the street and was told by him that he had sold it. He did not then tell appellant that his firm would claim a commission, nor does it appear that any such claim was made before the suit was brought. He was asked if he ever made any until appellant was about to take the train for Mississippi, but the question was objected to by plaintiffs and excluded by the court; to which exception was taken. His testimony in the case was in form of a deposition from that State.

There is no dispute of the facts above stated. If they comprise all that were material, our opinion would be that the verdict was against the law and the evidence.

Counsel for appellees, however, while conceding these to be as here stated, claim that there was one other fact, not embraced in the foregoing statement, which was disputed,

Tinsley v. Scott.

but rightly found for the plaintiffs and established their right to recover. The fact was what is called the special contract between the parties. Appellant testified that he told appellees he had put the land in the hands of other real estate agents for sale, and further that "the man who sells it first gets the commission." Appellees, admitting that he told them other agents had it also, deny that he used the language quoted, and each testified that J. A. Scott said to appellant "we want to understand this; if we sell the land, or any other real estate agent sells it to our customer or the man we furnish, or if you sell it to him at a less price than that you have given to us, then we are to have our commission," and that appellant answered "all right." It is insisted that two of these three conditions actually happened; that another agent sold it to their customer or the man they furnished, and that appellant made the sale to him at a less price than that he had given to them.

We are unable to see that appellee's statement, if correct, shows a special contract, or adds to the conceded facts anything in the slightest degree material. Nor do we see in it anything at all inconsistent with that of appellant. Properly understood, they are both alike superfluous. Neither goes at all beyond the law in its application to the simple case of placing one's land in the hands of a broker for sale at a price and for a commission stated, with notice that he has it in the hands of other brokers also on the same terms.

A broker so employed, though not thereby authorized to execute a deed or receive the price, does "sell" the land, in the sense of such employment, when he produces a party able, willing and ready to take it on the terms given, if no other such purchaser has been previously produced. Of several independent brokers under such employment at the same time, the one who first so sells is entitled to the commission. No express contract to that effect is required to give him that right. But to be a producer, the party presented must be a client or customer of his own, and not one

then sustaining that relation to another broker under like employment. If he was first in negotiation with such other he continues to sustain that relation to him until it is expressly broken off or the matter of the purchase has ceased to be held by him under consideration. The employer, with notice of the pendency of such negotiation, can not escape liability to the broker for his commission by selling to his customer through another, even, though he first discharges the former, if he does so without giving him a reasonable time to effect a sale. *Day v. Porter et al.*, 60 Ill. App. 386, affirmed in 161 Ill. 235. Nor, for the same reason—that it would be bad faith towards the broker—could he so escape by making such sale himself, especially if he sold for a price less than that given to the broker.

Was Birch a customer or client of appellees with reference to the purchase of appellant's farm when McKee suggested it to him? If not, they have no right to the commission claimed, under the law or the special contract. In the case above cited both the courts held the controlling question to be whether, when the second broker intervened the purchaser "still held under consideration" the subject of the purchase proposed by the first; and so it is here.

Upon that question the evidence was wholly and clearly against the appellees. The only terms they ever offered or suggested to Birch were absolutely and promptly refused—immediately upon a half hour's view of the land. He made no offer on his part, nor was he asked to do so or to consider the matter further. All occasion for it was effectually removed by his purchase of the Dale farm within three days. His refusal was promptly reported by appellees to appellant, who treated it as final. They so understood it and therefore made no further effort with either party to bring about a sale. The inference from the facts stated is that they as brokers sold the Dale farm to Birch. They knew it was for sale or they would not have taken him directly from appellant to look at it. Probably it also was on their list and they got a commission for its sale. Appellant was informed of it within five or six weeks. He had

Henderson v. Treadway.

no knowledge of any pending negotiations between appellees and any other prospective purchaser, for there were none; and therefore the question of a reasonable time for concluding any such negotiations could not arise. After three months from the time Birch ceased to be their customer, McKee, upon new, unexpected and materially different conditions, brought about the sale to him and received from appellant his commission therefor.

The verdict was manifestly against the evidence, and should have been set aside. For error in refusing to do so, to say nothing of others, the judgment will be reversed and remanded.

George H. Henderson, Adm'r, v. Jacob E. Treadway.

1. **WITNESSES—When Incompetent as to Transactions with a Deceased Person.**—An alleged creditor of a deceased person, who has been appointed administrator of such person, under the statute authorizing the appointment of creditors under certain circumstances, is not competent to testify as to transactions between himself and the deceased in a proceeding for his removal commenced by an heir.

2. **STATUTE OF FRAUDS—Recovery for Property Delivered Under an Agreement Within—The Rule Stated.**—When a party to an agreement which is within the statute of frauds pays money, delivers property or renders services to the other, in performance of it and before notice of its repudiation by the other, the latter is liable, upon an implied promise for the money so had and received, on a *quantum meruit* or *valebant*, for the services or for the value of the property, if it has been converted or put out of the power of the party to return.

3. **SAME—Recovery for Property Delivered Under an Agreement Within—The Rule Applied.**—A had grass land rented of B, and asked B to give him permission to use the crop of grass for the current year after the expiration of his term, whereupon B offered to do so provided A would rent the land for another year, to commence at the expiration of the first year, and to this A agreed, but no lease was signed. Under this agreement, A left part of the grass grown during his first year on the land, and, after the commencement of the second year, B refused to allow him to use the grass and repudiated the contract. *Held*, that, although the agreement was voidable under the statute of frauds, that B was liable for the value of the grass left on the land, under its provisions.

VOL. 69.]Henderson v. Treadway.

Petition in Probate.—Appeal from the Circuit Court of Cass County: the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 19, 1896.

R. W. MILLS, attorney for appellant.

MORRISON & WORTHINGTON, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellee filed a petition in the County Court for the removal of appellant from the office of administrator of the estate of James McHenry. It set forth that McHenry died May 20, 1895, seized of a large quantity of real estate, and possessed of notes and bank deposits amounting to \$20,000 or more; that his sisters and their children, all adults and under no disability, were his only heirs; that more than sixty days after his death, appellant, upon a claim that he was a creditor of the estate to the amount of \$250, applied for and obtained letters of administration, and that said claim had no validity in law or equity and was a fraud upon the court.

Appellant's answer denied all the charges of fraud, and asserted the validity of his claim as a creditor of the estate, upon an alleged state of facts in substance as follows:

In the spring of 1891, he rented from McHenry a 110 acre blue grass pasture for the season ending December 1st following, at \$400, and placed his cattle thereon near the last of May. About the 8th of August, the stream on which he depended for water having gone dry, he took them off and thereafter during the term had none on. One Brown had rented from McHenry for the same term another pasture, of twenty-eight acres, just across the road from appellant's, but that also having become dry, took off his stock about the same time, and appellant bought from him the residue of his term. On October 19th, the drought still continuing, he went with his hired man, Graves, to see McHenry, and told him that he had bought Brown's grass,

Henderson v. Treadway.

and on account of the drought wanted to make an arrangement by which he could eat off the grass later in the winter, after December 1st, or in the spring, and that if he couldn't make it he would secure water by digging and put on cattle enough to eat it off during the term; that McHenry then proposed to him that if he would take both pastures for the next term, to end December 1, 1892, at the prices they were then rented for, he might use the old grass after December 1st, at any time he should see fit; that he then accepted the proposition and agreed to take both the pastures accordingly; that the old grass on them was worth \$250 in April, 1892; that when the agreement was so made he had six or seven hundred steers, and but for that agreement could and would have secured water and put on stock enough to eat off the old grass during the current term, but relying on the agreement chose to leave it unfed until April 1, 1892, when he put his cattle on; that McHenry, within a day or two thereafter, turned them out, and although appellant was able and willing to pay for the pastures according to the agreement, refused to let him have them or to feed the old grass, and leased them to another party who went on and occupied them.

There is preserved in the record much evidence strongly tending to prove the substance of each of these allegations. Indeed it can hardly be claimed that any is denied except one, viz., that appellant had no stock on the pasture from August 8th, when he took them off, until after the expiration of the current term, December 1, 1891. Several witnesses did testify that they saw a few cattle on it from time to time until snow fell, but whose they did not know. That, however, was immaterial to the single issue on trial, which was whether appellant, when he applied for and obtained the letters of administration, was a creditor of the intestate; and the testimony of these witnesses would only bear upon the amount and not the fact of indebtedness, since it was shown beyond question and without contradiction, that on April 1, 1892, there was still old grass on the pasture of the value of \$200. In any view of the case appellant had the

right to put cattle on in the fall of 1891. His doing so, if he did, would not affect his claim here in question.

Some slight attempt is also made to throw doubt upon the allegation that appellant told the deceased on October 19th, that unless he could arrange for the right to eat off the old grass after December 1st, he would secure water and put on cattle enough to do it that fall. That also is immaterial if the agreement for another term was actually made; and counsel admit that "the evidence shows that Henderson agreed to take the pasture for the year following December 1, 1891." He could not agree without the concurrence of McHenry, and that agreement, if observed, would have entitled him to put his stock on at any time during that term, without any reason previously expressed, or any further consent or affirmative act of his lessor. But McHenry must have understood that he took them off in August because of the drought and made the agreement, in part, to get the use of the old grass remaining uneaten when he could do so to advantage, though it might be after the expiration of the current term.

Graves was the only person present beside the parties when the alleged agreement was made. He testified in the matter before the County Court, but died before the hearing *de novo* in the Circuit Court. His testimony, however, was there reproduced through the county judge, Robertson, cashier of the bank which held McHenry's deposit, who had taken an active interest on the side of appellee, and appellant himself. As was to be expected, they differed in some unimportant points, and somewhat in language upon others, but according to the recollection of each Graves did testify that appellant told McHenry he had come to make arrangements for eating off the old grass in the winter or spring, and if he couldn't do it, would dig for water and put on stock enough to eat it before December 1st; that McHenry said if he would take both pastures for the year following December 1st, he might eat it at any time he pleased, so that he didn't injure the pasture, and appellant agreed to do it; and also that he, Graves, had the care of

Henderson v. Treadway.

appellant's stock, and that none of it was on the pasture after August 8th until spring.

Appellant submitted to the court below four propositions, to the effect that upon the hypothesis of the facts supported by the evidence, and which we think were therein fully and fairly stated, appellant was in law a creditor of the estate.

Whether the court found the facts or any of them against appellant, and the propositions therefore inapplicable, or was of opinion that upon the facts therein hypothetically stated the law was not as asked to be held, we are not advised, but they were all refused; and also, as consistency required, others which relate to the measure of the damages for which, upon the facts so stated, McHenry was claimed to have become liable. Exception to such refusal was taken.

Error is also assigned upon the refusal of the court to admit appellant to testify to his conversation with McHenry on October 19th, when it is claimed the alleged agreement was made. Here the adverse party was proceeding as heir of the intestate, which distinguishes it from the case cited. I. C. R. R. Co. v. Reardon, 157 Ill. 72 (378-9). Appellant was not within either of the exceptions made by the statute to the rule of the common law which excluded him. The ruling was therefore proper.

We are of opinion, however, that the refusal to hold the propositions submitted was error. It is to be inferred that in the view of the court appellant claimed to be a creditor for damages sustained by McHenry's breach of the agreement, and that such breach, if any there was, did not in law make him such because the agreement was within the statute of frauds. This was a misapprehension of the claim, which was not for a breach of that agreement, but of a distinct promise implied by the law from several circumstances, among which were the agreement and its repudiation by McHenry. According to statements by text writers quoted, supported by a long and concurrent line of decisions cited in the brief for appellant, it seems to be settled that where a party to an agreement which is within the statute of frauds pays money, delivers property or renders services to

the other, in performance of it and before notice of its repudiation by the other, the latter is liable upon an implied promise for the money so had and received or on a *quantum meruit* or *valebant* for the services or for the value of the property if it has been converted or put out of the power of the party to return. This has been clearly recognized and upheld in Illinois. *Frazer v. Howe et al.*, 106 Ill. 563, and cases there cited. Both the rule and its justice are here fully conceded by counsel, but it is contended that this case is not within it because the property in question was not so delivered by appellant to McHenry.

On the 19th of October, 1891, that property confessedly belonged to appellant, and continued so to be until December 1st under his lease; and if the statement of facts as made in the propositions of law submitted was true, was still his when McHenry without previous notice to him of any intention to disregard the agreement of October 19, 1891, in April, 1892, turned his stock out, leased the pasture lot, at an advance of \$40, upon the rent appellant was to pay, to another party and put him in possession. For that agreement was entirely lawful and valid, though voidable. McHenry was enabled to get and did get possession of the old grass only through its actual and intended operation, for otherwise appellant could and would have had it consumed by his stock before the expiration of his current term. In principle, therefore, his act was the same as would have been his retention of so much money paid by appellant in advance for rent under the agreement, and made him liable for the value of the property of which appellant was thereby deprived.

Had the court held the propositions submitted and yet found against appellant on the facts, the question here would be whether the finding was warranted by the evidence, but as we are not advised of the finding on the evidence, as to the facts, it is whether the propositions should have been refused, as they were.

We are of opinion that they should not, and for error in refusing them the judgment or order will be reversed and the matter remanded.

I. C. R. R. Co. v. Beebe.

69 36
174s 12

Illinois Central Railroad Company v. Emma Beebe, Adm'x, etc.

1. RAILROADS—*An Owner of Stock Carried with Them is a Passenger.*—A person traveling by consent of a railroad company, upon a freight train, in charge of stock which is being carried for him, is a passenger for hire and entitled to the rights of such a passenger.

2. SAME—*Rights and Duties of Drover Traveling with Stock.*—A person traveling on a freight train in charge of stock under a contract requiring him to “take care of his stock” and to “ride in the caboose,” went into a freight car to water his stock, by the direction of the conductor, and while there the train was started and he was thrown off and injured. *Held*, that such person had no right to stay in the freight car longer than was necessary to properly care for his stock, and that if he did he was guilty of such contributory negligence as to prevent a recovery, but if without his fault, he was not allowed a reasonable time to give them proper care, and had no notice of the intention to start, he was not guilty of such negligence.

3. CONFLICT OF LAWS—*Application of the Lex Loci Contractus.*—Where a contract is a unit and is to be performed in part in the State where made, the *lex loci contractus* must govern as to its nature, interpretation and effect, and if the contract is void or illegal by the law of the place where made, it will be held void and illegal everywhere.

4. CARRIERS—*Can Not Limit Liability for Negligence.*—Carriers of passengers are required to exercise the highest reasonable and practicable skill, care and diligence for the safety of their passengers, and this duty is imposed by public policy, and responsibility for damages caused by its breach can not be limited by contract to such as result from gross negligence.

5. SAME—*Presumptions as to Cause of Injury to Passenger.*—The happening of an accident to a passenger during the course of his transportation raises a presumption of negligence and the burden of rebutting this presumption is upon the carrier.

6. TRIALS—*Improper Remarks by Counsel—Presumptions Regarding.*—Every reasonable presumption will be indulged that a trial judge has performed his duty, and has permitted no misconduct of counsel materially injurious to the opposite party.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed January 29, 1897.

WILLIAMS & CAPEN, attorneys for appellant.

FIFER & BARRY and A. B. DAVIDSON, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Action on the case by appellee against appellant, for alleged negligence in causing the death of her intestate. The jury found the issue for plaintiff, assessing her damages at \$5,000. A new trial was denied, judgment rendered on the verdict and this appeal taken.

Deceased shipped a car load of horses and household goods at Webster City, Iowa, for Lebanon, Indiana, via Dunleith, Freeport, La Salle and Wenona, Illinois, on a through freight train of appellant for Chicago, which left between seven and eight o'clock in the morning of April 15, 1894. At Freeport, where it arrived some time after eleven o'clock p. m., his car was taken out and placed seventh after the engine in another train, going south.

The shipping contract provided that "the owner will feed, water, and take care of his stock at his own expense and risk. Free transportation will be given to the owner or his *bona fide* employe in charge of the stock, as per current instructions given to agents. Persons so passed will be conveyed at their own risk of personal injury from whatever cause, except injuries arising from gross negligence of the railroad company, and must ride in the caboose attached to the train conveying the stock."

At La Salle, the train stopped to change engines, and there the deceased, pursuant to an understanding with the conductor, watered his horses. They were in the back part of the car, with their heads to the east, going south, and separated from the household stuff by a two-by-twelve inch plank nailed across it some three feet above the floor. There were seven in all, of which the one next to the plank was a small broncho pony which had been used several years for family driving, and was very gentle. In front of them was a manger filled with hay and some sacks of oats. The east door could not be opened on account of the goods as loaded.

I. C. R. R. Co. v. Beebe.

In watering the stock, deceased was assisted by the conductor and the rear brakeman. When the last bucket was handed up to him, the train started out, and without again stopping ran twenty miles south to Wenona, where it arrived a little after six o'clock on the morning of the 16th.

There appellant's road, at a point 1250 feet north of its station crossed that of the Chicago & Alton Company, on an up grade going south of thirty four feet to the mile. The train, composed of nine loads and five empties, having made the usual stop for this crossing, started up, ran to the south end of the yard, a short distance south of the station, stopped there only to set out a car, and went on.

While making this crossing the deceased, who had remained in his car all the way from La Salle, fell or was thrown out of its west door, and his right foot and ankle, being somehow caught under the wheel, were crushed. Within three hours they were amputated by Dr. Ensign, the company's local surgeon, from Rutland, assisted by Dr Potts, of Wenona. The operation was properly performed and he was left in the care of an experienced nurse, to be under Dr. Potts' direction. The surgeons did not anticipate a fatal result, but just before noon of the next day signs of serious internal injury appeared—swelling and discoloration of the abdomen, with severe pain—and toward seven o'clock in the evening he died. The two named were the only surgeons who saw him, but two others, testifying hypothetically, concurred in their opinion that death was caused by internal injury producing peritonitis, and not the crushing or amputation of the limb, though the tendency of the latter was to aid the effect of the former by reducing the power of the system to resist it. He was of a fine physical form, sober, industrious, in vigorous health, and died in his thirtieth year, leaving appellee his widow, and one child, a son about three years of age.

The allegation of negligence in each of the counts was substantially the same, that the train having come almost to a stand-still, the engineer negligently, carelessly, suddenly, violently and without warning, started the engine

forward, and thereby with great force and violence jerked the car in which deceased was a passenger, by means of which he was thrown down and out of it, and received injuries in his back, side and legs, and internal injuries, from which he died.

It is earnestly contended for appellant that the verdict was manifestly against the weight of the evidence, if not wholly unsupported by any on every material point; that there was no unusual violence in the jerking or bumping of the cars, but only such as is inevitable to freight trains in taking up slack; that the accident was due to the negligence of deceased in being near the open door or in the car at all at that time; and that his death was caused, not by the accident or the consequent surgical operation or both combined, but by internal injuries produced by the kicks of the pony on the day and evening before.

Six witnesses testified to the very unusual violence of the bumping and jerking of the cars in making the crossing. Dr. Potts, having come home after being all night in the country on professional service and dozing on a lounge, was aroused by them. He said there were three or four, of which one or two were very loud and violent, jarring his house a hundred and sixty feet away. Mrs. Elsazer, residing near the crossing, while at breakfast heard the unusual bumping and watched the train to see what they were doing to cause it. Her statement was that "after it got partly over the crossing it was bumping harder; came almost to a stand-still; then they gave this hard jerk that jerked him off." She was the only witness who saw him inside the car, and said he appeared to have been first thrown down, with his face toward the door, and was endeavoring to rise when the hard jerk threw him forward; that he tried to hold on to the door, but was thrown out upon the ground "with great force;" and that she had never before heard bumping as hard as this—"nothing like that one bump."

Her husband, a section foreman of the Chicago & Alton R. R. Co., said the bumping on this train was harder than usual.

I. C. R. R. Co. v. Beebe.

W. S. Clark, a laboring man, stated that "the jerks were severe, more than usually so," and that "one was louder than he had ever heard." Two others—a laborer and a teamster—so characterized the crossing movement generally, and one jerk particularly.

These witnesses were all strangers to the deceased and to the parties, having no interest whatever, directly or by relation, in the event of the suit. Their judgment was not an afterthought suggested by the accident. Their attention to the violence of the jerking was aroused before they saw the train or knew that any accident had occurred, and their recollection fixed by its occurrence, of which they immediately learned.

For appellant, a teamster and a farmer, hauling cinders for the city, who were on opposite sides and within forty feet of the train when it crossed, waiting for it to pass, testified that they observed nothing unusual in the jerking or bumping of the cars; and four of the crew, conductor, engineer, fireman and brakeman, together with the company's station agent at Wenona, that it was only such as necessarily occurs in taking up slack, and its violence on the occasion in question was not at all uncommon.

It is said the train hands had better means and opportunity of knowing whether there was or was not anything uncommon in the manner of crossing than had the witnesses for appellee; that if what they stated was not true they must have been guilty of perjury; and that they were conclusively corroborated by the fact that no coupling was broken, nor other injury done to the train.

If counsel for appellant, of large experience in litigation of this character, really regard that fact as conclusive of the question, as no doubt they do, it might reasonably be expected that employes on a freight train would so regard it and honestly so testify. But we apprehend that jurors and judges do not, nor will, as against positive and disinterested evidence to the contrary. And opportunities may be so common as to be overlooked or disregarded in particular instances. Train hands, constantly used to these jerks and

VOL. 69.]I. C. R. R. Co. v. Beebe.

bumps, of different degrees of violence, expecting them on every start, prepared for and almost instinctively adjusting themselves to them, and intent upon their own work at the time, might easily fail to so notice even an uncommon degree of it on a particular occasion as to remember it for an hour, unless it resulted in some such injury to the train, interrupting their work, or other accident immediately known. Here there was no such reason for remembering anything in particular about it. They knew nothing of the unfortunate accident until the train reached El Paso, nearly, if not quite, an hour's run from Wenona, where they were informed of it by telegram, and not then, so far as appears, that it was supposed to have had any connection with the jerking or bumping of the car. It is therefore not strange that they then recalled nothing as unusual in making that crossing, and there is no room for a suspicion of perjury in their testimony to that effect. It is true that the form of most of their statements as abstracted was positive that there was nothing unusual in it—but from the nature of the case, as relating to a particular car which might be more affected than others, it would seem to be, in force and effect, merely negative. Only one of them was shown to have been near that car at the time. He was on top of the car next ahead of Beebe's and a witness testified that when they started and jerked it, it kind of raised, as it often does with a quick jerk. The proper positions of the engineer, fireman and brakeman were all remote from it, and that of the conductor does not appear. Mrs. Elsazer's statement of what she alone saw is quite as persuasive as that which, in common with the other witnesses for appellant, she heard; they are quite as strongly corroborated by the undisputed effect upon the deceased as are the adverse witnesses by the fact that no coupling was broken nor the train otherwise damaged; and perjury could be better assigned upon their positive statements, if false, than upon those of appellant's employes.

Upon the question of unusual violence there was manifestly such a conflict as forbade the court's taking its decis-

I. C. R. R. Co. v. Beebe.

ion from the jury according to their belief from a preponderance of the evidence. It was their part to determine not only whether the management of the train in making the crossing was improper, but also whether, if improper, it amounted to negligence making appellant liable for the injurious consequences, if any such resulted without fault of the person injured; and we are satisfied with their finding on both points.

Did this negligence directly cause the injury which resulted in Beebe's death.

It certainly threw him out of the car, and thereby caused the injury to his limb which required its amputation, followed soon afterward by his death. But the surgeons were of opinion that his death was attributable, immediately, not to the crushing of the limb nor to the surgical operation required, but to internal injury produced by some violence causing peritonitis; and it is claimed for appellant that this violence was a kick or kicks by the broncho pony.

Henry E. Thompson, a live stock dealer and friend of the deceased, who was on the train with him from Webster City to Freeport, having three cars of cattle in it for Chicago, testified that just before they arrived at Waterloo, which was about noon, the deceased, accompanied by the witness, went to his car to feed his horses, and getting down under the plank that separated them from the household stuff, hit the pony with his elbow, which scared her, and she jumped on him and kicked him; that between five and six o'clock in the afternoon, they again went to that car for the same purpose, and under like circumstances deceased was again kicked by the pony; that he said she kicked him in his right side above the hip, and to the witness, "Look where she kicked me," but he, upon examination, "couldn't see any place whatever." They played cards during most of the evening and parted at Freeport near midnight. As deceased stepped off the caboose at Freeport he said, "My side hurts me yet, where that pony hit me, but I guess it won't amount to much." About five o'clock the next morning, at La Salle, he watered his horses,

VOL. 69.]I. C. R. R. Co. v. Beebe.

and although this was about twelve hours after he received the last kick, it doesn't appear that he then seemed to be at all ailing. Between one and two hours later—just after he was thrown out of the car and his limb was crushed, at Wenona—Dr. Potts examined him, and saw "no trouble except the leg, until about twenty-four hours after the amputation," when he found some "about the upper portion of the abdomen, like a bruise, and perhaps one on the left hip and shoulder." Dr. Ensign, who performed the amputation, says: "I found him complaining of his injured limb and of his hip; with a crushed foot and ankle. I saw no other marks of violence; his limb was not dislocated. There was a slight abrasion on the left side of his foot and a very small settling of blood on the other limb. These were small matters. After the amputation I examined his abdomen. It seemed to be in its normal condition." On cross-examination he added: "He complained of his hip. I examined it, and there was a little blue spot, a little abrasion of the skin on the left side, probably received with the injury. I examined him carefully. He thought his hip was displaced; complained of nothing but his foot and his hip." This was sixteen hours or more after he received the last kick from the pony.

The nurse employed by the company's surgeon to take care of him from the time of the amputation until he died, a man of many year's experience as a nurse, discovered, a little after noon of the day following the operation, that his abdomen was bloated and swelling, and he complained of pain there. That was only seven or eight hours before his death and more than thirty-six after the kick.

The testimony of Doctor White, uncontradicted, was that peritonitis may be caused as well by a violent fall on the stomach and abdomen upon a smooth, hard surface, as by the kick of a horse; and when caused by violence is usually developed within a few hours, scarcely ever going beyond a day.

Here, then, is much evidence clearly tending to prove if Beebe died of peritonitis, it was caused by just such a

I. C. R. R. Co. v. Beebe.

fall and not by the pony's kick. While trying to rise from a recumbent position, with his face down, he was thrown out "with great force" from the height of a freight car floor. The declaration alleged "internal injuries," among others, of which he died; and this also was a question of fact for the jury. That they found the preponderance on the side of appellee is to us no matter of surprise.

Was the deceased chargeable with contributory negligence? It is asked why was he in the door, and suggested as a probability, that "he had been asleep, waked up and found they were in a town, stepped to the door to look out, and his nerves being unsteady, tumbled out." The uncontradicted evidence is that he was not in the door of his own volition, but at a safe distance from it, when he was thrown down toward it by one jerk or bump, and then, despite his efforts to prevent it, and before he could rise, hurled out by another and a harder one. Appellant's witness Hall, who was on the west side and within thirty feet of the train, says, "I did not see the man in the door, as it passed me," and that "just as the caboose crossed I looked down the track and saw him fall from the car;" thus corroborating, as far as he goes, the statement of Mrs. Elsazer.

The question remains, by what right was he in that car? By his contract he was bound to "ride" in the caboose, and it is the law that if in violation of that contract he was riding in the stock car when he was injured, ordinarily there could be no recovery of damages for the injury sustained while so riding and in consequence thereof.

But he was a passenger for hire on the train, and entitled to all the rights of such, except as limited by his special contract. N. Y., C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 40, and cases there cited. By that contract he was bound "to feed, water and take care of his stock." By that contract, therefore, as well as by an express understanding with the conductor, he was rightfully in that car, for that purpose, at La Salle. He could be there without riding in it only in case the train should be stopped long enough, at proper times, to give him a reasonable opportunity to

accomplish his purpose and get back to the caboose. Was such an opportunity given him at La Salle?

There was but little evidence on this point, and it was all from the train hands. Upon inquiry the deceased was told by the conductor that he could water his horses at La Salle; that there was a hydrant at that station and he would stop his car there to enable him to do so. They reached it at the early hour of five o'clock. Whether there was any work for the train there, except to change engines, was not shown; but it may be inferred from other facts that there was not. The water was brought from the hydrant in a bucket or buckets by the conductor and brakeman, who, from the side of the car, passed it up to the deceased in the door. Brakeman Calam, who was standing on the station platform watching them, being asked "How long did it take?" answered, "Probably two or three minutes." Without holding him to strict accuracy in such a statement, it seems reasonable to infer from the circumstances that it was a brief and hurried performance, and that immediately after the last bucket was handed up the conductor signaled the engineer and the train was started, without notice to the deceased of the intention then so to do. He had seven horses to water, and otherwise care for, if necessary or proper. Their heads were to the side of the car opposite to that of the door at which the water was handed up, and they were so close together that at Clinton they were found to be hot and steaming. This may have made them restive, and required attention to their halters and mangers at La Salle. He had to go under or over the separating plank mentioned to reach six if not all of them. Butcher, who was understood to have left the State and whose whereabouts were unknown, did not testify, and the conductor at this critical point said only that Beebe "stayed in the car," without an intimation, because he did not nor could not know that when the train started Beebe was not still actively and with all due promptness employed about his rightful duty to his horses, or had notice of his intention to start the train when he did.

I. C. R. R. Co. v. Beebe.

If, without necessity for further attention to them, he chose to stay and ride in that car, he was chargeable with such contributory negligence as should prevent any recovery in this case. But if, without his fault, he was not allowed a reasonable time to give them all needful or proper care, and had no notice of the intention to start, he was not. And that also was a question for the jury.

It was a light train and a fast one—ranking next to a passenger—and therefore readily acquired speed. Beebe was not bound to omit any proper care of his stock, nor to risk an attempt to get out of a freight car in motion, and on a caboose seven car lengths behind it, rapidly increasing its speed; and the next stop was at Wenona, where the accident occurred.

Upon this question the jury were properly instructed, and were not without evidence from which they might reasonably infer that by the undue haste of the conductor in starting the train at La Salle, and without fault of the deceased, his staying in the car was fully justified or excused. For it was obviously a question of vital importance to appellant; and of those having knowledge of the facts bearing upon it who could tell? There were none but its servants; and not one of them leaves an impression that there was an interval between the handing of the last bucket and the signal to start of as much as ten seconds, or time enough for the last horse watered to get his drink and for Beebe to get back to the caboose, to say nothing of other care for his stock that might have appeared to be and actually was necessary or proper. For the rule as to the burden of proof of a negative averment or claim (that Beebe was not allowed sufficient time), and the presumption from the want of evidence, where it is not in the power of plaintiff and is in that of defendant, see Great Western R. R. Co. v. Bacon, 30 Ill. 347.

Since the case was submitted we have been referred to Heumphrens v. The F. E. & M. V. R. R. Co., 65 N. W. Rep. 466, but do not perceive that any question here made was there involved, or touched even incidentally. The

shipping contracts were alike, but there it was claimed that by custom, shippers of live stock in less than a car load were authorized to ride in the car with their stock, and evidence to prove it was admitted on the trial, over objection by the company. A majority of the reviewing court held that the evidence produced was not sufficient to prove the alleged custom, and that if it were it could not override an express contract to the contrary—the presiding justice dissenting. Here no such claim was recognized by the trial court or made by the appellee. On the contrary, the jury were expressly instructed that the contract bound the deceased to ride in the caboose, except when necessarily or properly employed in the duty of feeding, watering and properly caring for his stock; and that unless he was so there at the time of the accident, they should find for the defendant.

Much time has also been given to the consideration of another provision of the contract, viz., "that persons so passed will be conveyed at their own risk of personal injury from any cause whatever, except injuries arising from gross carelessness of the railroad company;" of which it is said there was no evidence.

The contract was made in Iowa. Of the transportation thereby contracted for, one hundred and seventy miles was in that State, and the residue through Illinois and in Indiana, where it was to terminate. The cause of action, if any, which was transitory, arose in Illinois, where the suit was brought. Appellee introduced in evidence section 1308 of the Iowa Code, which declares that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into;" and also the opinion in *McDaniel v. C. & N. W. Ry. Co.*, 24 Iowa, 412, in which it was held that by that provision a contract made in that State and limiting the common law liability of the carrier of goods shipped from there to Chicago was made void and could not be enforced in Iowa.

It is claimed on behalf of appellant that this statute could

I. C. R. R. Co. v. Beebe.

have no extra-territorial force; that “where a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed,” citing 3 Am. & Eng. Encyc. of Law, 545, and two adjudged cases; and that the contract here considered is not forbidden or disallowed by the common law or that of Illinois, for which no authority is cited.

The only provision in the contract that is questioned is the one that attempts to limit appellant's liability for personal injury to the deceased. In denying or giving effect to that provision the Illinois court is not denying or giving extra-territorial effect to the Iowa statute, but simply applying the Illinois rule for the construction of an alleged contract made in Iowa. Its validity and effect must be determined by some law, to be ascertained and fixed by some rule. In Pennsylvania Co. v. Fairchild, 69 Ill. 260, the rule for such a case was declared to be well settled and to have been often recognized by that court, that “contracts are to be construed according to the laws of the State where made, unless it is presumed from their tenor that they were entered into with a view to the law of some other State.” There the goods were shipped at Valparaiso, Indiana, consigned to appellee at Leavenworth, Kansas, by delivery to the P., Ft. W. & C. Ry. Co., whose road was then under control of appellant and terminated at Chicago. With the goods there was also delivered the customary shipper's order, containing besides the usual description of the package, destination and name of consignee, the further statements that it was “delivered to the Pennsylvania Company, operating the Pittsburg, Fort Wayne & Chicago Railway,” and “to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading.” The bill of lading contained an agreement to carry the goods to the company's freight station in Chicago, limiting its liability to its own line, and an exception for loss occasioned by fire. The goods, leaving Valparaiso on the evening of October 5, 1871, were transported to Chicago

VOL. 69.]I. C. R. R. Co. v. Beebe.

and there delivered into the custody of the Chicago & Alton R. R. Co. on the 7th, and while in the care of the latter company were destroyed by the great fire of October 8th and 9th, 1871. Evidence was introduced by appellant to the effect that by the law of Indiana, where the destination is beyond the line of the carrier receiving the goods, if it delivers them to the one next in line of transit, it will not be liable for their loss thereafter; but the trial court refused to admit in evidence the shipper's order and bill of lading, and instructed the jury that "if the Pennsylvania Co. received the goods, marked and directed to Leavenworth, in Kansas, that made them liable to carry them to that place, and for their value if lost or destroyed on the way"—which was in accordance with the law of Illinois. But the Supreme Court, holding the rule of construction as above stated, further said "there was nothing in the case, either from the location of the parties or the nature of the contract, to show that they could have had the law of Illinois in view, or any other law than that of the place where it was made;" and for excluding the evidence, and giving the instruction referred to, thereby ignoring the law of that place, the judgment was reversed.

There is no more reason for supposing that the parties here had in view any other law than that of Iowa. The contract itself was clearly intended, at least by appellant, to limit its liability to the same extent throughout the whole course of the transportation contracted for. It is entire and indivisible, and its terms are too plain to admit of construction or doubt as to its meaning. Whatever may be the rule when a contract is divisible and any part is to be wholly performed in a State or States other than that in which it is made we are of opinion that in a case like this, where the contract is a unit and to be performed in part in the State where made, the *lex loci contractus* must govern as to its nature, interpretation and effect, wherever it is relied upon as a ground of action or defense. Michigan Cent. R. R. Co. v. Boyd et al., 91 Ill. 268; the McDaniel & Fairchild cases, *supra*; Rorer on Inter-State Law, 2d Edition, pp. 6S (and note

I. C. R. R. Co. v. Beebe.

6) and 69 (and notes). The limitation, then, being against the law of Iowa, the court below properly instructed the jury that it was of no binding effect here, and the case was submitted to them upon what was understood to be the law of Illinois. Certainly the court was not bound to give effect to that provision of the contract by any rule of comity to the State of Iowa, since it was against the law of that State, nor to consider what might be the law of Indiana since the contract was not made, nor did the alleged cause of action arise, nor was action brought in that State.

By the law of Illinois, Beebe was a passenger for hire, and appellant was "held to the same strict accountability for the negligence of its servants resulting to a passenger who is lawfully and properly on a freight train, as governs its liability for such negligence when the transportation is upon a train devoted to passenger service exclusively." N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. pp. 47-8, and cases there cited; and the degree of care required of the carrier for the safety of the passenger is there declared to be "the highest reasonable and practicable skill, care and diligence." C. & A. R. R. Co. v. Arnol, 144 Id. 261.

Since this duty, growing out of the relation of the parties, is imposed by public policy with reference to that relation, responsibility for damages caused by its breach can not be limited by contract to such as result from gross carelessness; and while the law requires proof that the carrier has been negligent, the Blumenthal case further holds that "the happening of an accident to a passenger during the course of his transportation raises a presumption of such negligence," and that "the burden of rebutting this presumption rests upon the carrier." Pp. 48-9, and cases cited.

Besides such a happening here shown, there was evidence directly tending to charge it to improper management of the train, and also to show that Beebe was rightfully in the freight car at the time and not negligently exposing himself to the effect of the jerks which, as it appeared to the only witness who then saw him, against his utmost efforts to prevent it, threw him down and out.

Whether he was in fault for being in it or dangerously near the door was a very material if not the decisive question in the case. The burden of proving that claim was upon appellant, all available testimony upon it being at its command, and it was a question for the jury. We are unable to share the confidence of counsel that their finding was against or without a preponderance of the evidence to support it.

Thus we are of opinion that upon every material question of fact there was such a conflict of evidence as required its submission to the jury, and so much for appellee as to make their finding conclusive if there was no misleading error of the court that may have induced it. Complaint on that score is confined to the ruling on instructions of which thirteen were given for plaintiff, eighteen for defendant—six of them being first modified by the court—and six others refused; including the one directing a verdict for defendant.

Of those given for plaintiff, the first three, the eighth, and the last three, respectively, are claimed to be materially erroneous.

The first is that "the contract offered in evidence, in so far as it required the plaintiff's intestate to feed, water and take care of his stock at his own risk of personal injury arising from the negligence of the defendant's servants, is of no binding force;" and it is said this tells the jury, in effect, that when the train was in motion the risk of personal injury to the decedent was upon the railroad company"—omitting a part as material to its meaning as is the part of Hamlet to the play of Hamlet. Conceding the utmost, what the instruction told the jury was that the company could not by contract require a passenger for hire to do anything on its train at his own risk of personal injury "arising from the negligence of its servants." The contract referred to in the instruction on its face conclusively showed that plaintiff's intestate was a passenger for hire, and the description of the injuries intended, as a class distinguished from others by their origin or cause, namely, the negligence

I. C. R. R. Co. v. Beebe.

of the carrier's servants, without addition or qualification, should not be held to embrace those of another and different class, as determined by the same basis of classification, namely, those arising from the negligence of both the carrier and the passenger. Therefore the injury referred to in the instruction was probably such and certainly might be such as should be caused without the slightest contributory negligence of the passenger. The risk of such an injury can not, by contract, be put upon such a passenger. Public policy forbade it, and public policy does not yield to private contract. Applied to any provision intended to have that effect, the instruction would have been proper. The only error here was in assuming that the one referred to was so intended. In our judgment it meant only the risk of injury to the horses from his neglect, or to him by them or otherwise, in the course of his caring for them, without fault of the railroad company.

But that error could not have prejudiced appellant. Here no damage was claimed for any injury to the live stock or to the decedent by it, and the question of personal injury to him by negligence of appellant, as affected by contract, is fully saved and perhaps more distinctly presented by the exception to the second instruction. That instruction simply declared the other provision, heretofore quoted, limiting the liability for personal injury to the passenger to those "arising from the gross carelessness of the railroad company," to be void.

The objection urged to it rests entirely upon the assumption of flagrant contributory negligence on the part of Beebe, which is sharply denied on the evidence. But were it true, that fact would neither help the provision nor hurt the instruction. For if it would bar a recovery except for willful injury, or negligence gross enough to amount to it, that would be because such is the law in that case, independent of express contract, and not by force or operation of the provision. That is absolutely nugatory because it attempts by contract to shield appellant against liability for injurious results of its own culpable carelessness (not gross), regardless

VOL. 69.]I. C. R. R. Co. v. Beebe.

of whatever care Beebe should use for his safety; which, as before said, is against public policy. In an instruction upon the naked question of the validity of a particular provision in the contract, the court could not properly refer to alleged but disputed facts, which, if as alleged, could not affect that question. They have their due effect under the law which makes void the provision.

The third construes the contract to mean that Beebe was "required to feed, water, and take care of his stock at his own expense, and that when he was not properly and necessarily so engaged he should ride in the caboose."

Recurring to the contract, hereinbefore quoted, it will be noticed that each of these requirements is in a complete and independent sentence and the two are separated by another intervening, thus: "The owner will feed, water," etc. * * * Free transportation will be given, etc. * * * Persons so passed will be conveyed at their own risk of personal injury, and must ride in the caboose attached to the train conveying the stock." The clause of the instruction, "when he was not properly and necessarily so engaged," is not in it, nor is any equivalent thereto; and the word used is not "should" but "must" ride in the caboose.

A railroad company is not bound to carry a shipper of live stock or other property upon its freight train, but may do so if it chooses, in which case it may require him to ride in the caboose, as well for the safety of the passenger as for its own protection. Nobody has denied that the requirement so to do in this case is valid under the Iowa statute, the common law or any law of Illinois. But if the company also requires the shipper of live stock to feed, water and take care of it while on the train, thereby relieving its own servants from that burden, which they must otherwise bear, it necessarily implies a right to him to be in the car conveying it whenever it is necessary or proper for that purpose.

The construction of the contract given by the court in this instruction goes no farther. Counsel argue, however, that in effect it nullifies the contract, because it leaves

I. C. R. R. Co. v. Beebe.

“nothing to prevent a shipper caring for his stock all the time, in the car, and would not go near the caboose during the entire time of transit.” Hence they contend for what really seems to be the only alternative view—that under the contract he is required to be in the caboose during all the time that “the train is in motion.” To admit an exception is to yield the argument; and yet, conceding it to be the rule, there must be exceptions in favor of the shipper’s right to care for his stock. The company’s servants put the train in motion. It may, on occasion, be proper to do so unexpectedly or be done carelessly, while the shipper is rightfully feeding his stock. It may be reported to him in the caboose that a horse is apparently sick, or loose and making trouble. Many like cases for instant and necessary attention may occur while the train is in motion, or, arising during a stop, require continued attention after it is properly put in motion. All reasonable and practicable protection to the company against the abuse of his right is afforded by the construction complained of, while the one contended for would leave him without reasonable security for its just enjoyment. Whether his being in the car while the train is in motion is within the rule, or the exception, must depend upon the circumstances and be determined by the jury.

A further ground of objection to the instruction, asserted but not argued, is, that it assumed material facts in dispute.

After giving the construction above considered, it proceeds: “and if you believe from the evidence that ‘the deceased was properly in the car for the purpose stated,’ ‘and while he was’ so there ‘and in the exercise of ordinary care for his own safety, *was thrown* from and out of the car’ *through the carelessness* of defendant’s servants as charged, *whereby he received* injuries from which he died, *then you are instructed that your verdict should be for the plaintiff.*”

We think the criticism assails the syntax rather than the sense of the instruction, and if just to that extent—which we do not concede—no reason is perceived why the maxim

mala grammatica non vitiat chartam should not apply. The language employed, according to good usage, means that the condition, "if you believe from the evidence," attached alike to every clause following down to the conclusion, that "then," in that case, you should find for the plaintiff.

There is no foundation in fact for the complaint made of the eighth. It does not state absolutely and without qualification, as asserted, that "if the defendant did not exercise the highest degree of care known to the law the plaintiff was entitled to recover." The instruction is: "If you believe from the evidence the plaintiff's intestate was a passenger traveling in charge of his stock, which the defendant was transporting for hire," then it became the duty of the defendant to exercise for his safety the high degree of care stated, but does not declare the plaintiff entitled to recover upon mere proof of the breach of that duty. On the contrary, after only a semi-colon, it goes on, not "with other matters as independent propositions," but in direct connection with that statement and properly to qualify its effect, as follows: "and if you believe from the evidence that plaintiff's intestate was properly and necessarily in the car, etc., the verdict should be for the plaintiff." We perceive no fault in the instruction.

The last three relate to willful negligence or its legal equivalent, upon the hypothesis that Beebe's being in the freight car was wholly his own fault.

It is claimed there was no evidence upon which to base them; that unless the engineer had notice or reason to suppose he was in that car, he could not have been guilty of willful or gross negligence as to him, in making the crossing as it was made. In this connection the assertion is repeated that both the engineer and the fireman positively swear they did not know that Beebe was in the car with his stock, and that there is no fact or circumstance tending to contradict them.

We find in the record no such positive swearing, and whether it is the more reasonable inference from what the engineer does swear, may be doubted. No question was

I. C. R. R. Co. v. Beebe.

asked as to his knowledge or supposition; and all he said on that subject was, that he saw Beebe, with the train men, watering his stock at La Salle, and that after they left La Salle, and between that and Wenona, he did not "see" him. He must have seen the conductor assisting Beebe on the west or right side of the car. The horses were watered from that side. Beebe would have gotten out on that side to go back to the caboose, the east door being fast closed by his goods against it. Had he done so, the engineer, looking to the conductor on that side for a signal, would probably have seen him. He got the signal very soon after the last bucket was handed up, but did not see him. His inference, if he noticed and thought anything of the circumstances, must have been that Beebe was staying in the car for some reason, presumably good, and that the conductor did not think it at all important to delay the start on that account or give him notice of his intention to make it when he did. These circumstances, unexplained, certainly tend to show that the engineer and conductor knew or ought to have understood that he was there when the train left La Salle. The fireman said he did not see Beebe at all. Probably he was on the left or east side of the cab. But the instructions asked and given for appellant implied that if the engineer knew, or from the circumstances ought to have understood, that Beebe was still in the car when the crossing was made at Wenona, he could have been guilty of gross negligence in respect to him, and that there was some evidence tending to show he had been (1st and 6th as asked and modified). Whether it was in fact gross, and if so, how gross, were questions for the jury, and appellant can not now insist that there was no basis for the instruction upon them given for appellee.

For reasons appearing from what has been said, we think there is no substantial ground for complaint of the court's action upon any of those asked for appellant. Either the law, or the evidence, or both, required it to refuse or modify as it did.

The twenty-seventh and last point stated in the brief, is

that the judgment should be reversed "for improper remarks of counsel to the jury and refusal of the court to rule them out." But it is placed at the head of the argument, as is said "partly because it is believed that the court need go no further in the case, and partly because it is vastly more important to appellant and to all the other railroad companies in the State that such procedure should be stopped than the decision of this or any other case."

The remarks referred to, made by counsel for plaintiff in the closing argument to the jury, were that "these railroad men are compelled to swear for their job, and the big men of the railroad hold over them a club, and they must swear for their job." Immediately following this quotation, the bill of exceptions proceeds thus: "Objected to. The Court: Perhaps that is objectionable. To which the defendant then and there objected." Counsel addressing the jury submitted without a word, and so far as appears, did not again offend anybody's idea of propriety.

Upon this state of facts the argument for appellant starts out as follows: "We earnestly submit that it is the imperative duty of this court, not only to the appellant, but to the cause of public justice, to a vast number of railroad men, and to maintain ordinary respect for courts in the public mind, to reverse this case for this reason, without regard to any other consideration. Unless trial by jury is to become a mockery and a byword, such conduct can not be allowed to go unrebuked, and a rebuke of this court, without action, will mean nothing."

The judgment here should be reversed only for material error appearing in the record and duly excepted to. In this case it appears that although the court's attention was called to the remarks complained of, at the time, it was only by a simple and general objection, a form requiring no more for a complete disposition of it than to be simply sustained or overruled. There was no refusal to rule them out, for no such ruling was asked. To what was asked the court responded in an expression which was rightly understood as sustaining the objection and amounting in effect to an order

I. C. R. R. Co. v. Beebe.

expressly ruling them out as improper. That counsel for defendant so understood it, and were satisfied that the jury also did, is to be inferred from the fact that they did not ask for such order nor for any instruction with reference to the matter. So far, then, we see no error. And here, in our judgment should have been the end of it. The advantage, if any, was with the defendant.

But exception was taken to the court's expression, which is also assigned as one of the reasons in support of the motion for a new trial, and has been so presented in argument here, both printed and oral, that we feel bound to notice it somewhat particularly.

The fault imputed to it is that it is too mild; not sufficiently positive and emphatic. This is a novel objection, proposing an exception to the rule, as universal as any we think of, that a party can not assign for error a ruling in his own favor. But it is insisted that even a pointed rebuke of counsel and severe characterization of his remarks could not fully counteract their prejudicial tendency; that these were due, but that the court should have followed them up by instantly setting aside the verdict, and because it did not this court should reverse the judgment, without regard to the merits or the evidence; and this is based upon the view taken of the grossness of the alleged misconduct, which is expressed as follows: "Without the slightest evidence to support the allegation, he deliberately states that all the thousands of men employed by appellant are perjured scoundrels, who are compelled to, and do, under penalty of loss of employment, go upon the witness stand and swear, not to the truth, but whatever they are commanded to do by the officers of the company, and that these officers themselves, in all cases where they think it necessary to enable them to win a verdict, are guilty of subornation of perjury. Indeed, the charge is against all the railroad men in the country—one-eighth of the entire laboring population."

This is very far from being a just representation of what was said, as we see it. It is hardly supposable that any lawyer in his sober senses, to a jury in the presence of a

VOL. 69.]I. C. R. R. Co. v. Beebe.

judge, under whatever provocation, could make charges so sweeping, irrelevant, groundless, palpably false and absurdly extravagant. They could not excite any prejudice against any witness or the party for whom he testified, but would have exposed himself to crushing rebuke by the court, impaired his influence with the jury and tended to weaken his client's case. That he was not rebuked, and that he got a verdict in her favor, are facts affording some proof that neither the court nor the jury so understood him; and we are hardly able to recognize in the picture a single feature of the original. Considered by itself, as a single sentence from an extended oral argument in reply, it is probable that however it may have been as to the idea, the form of its expression was not very "deliberately" framed, but in the heat of controversy the strongest that occurred to the speaker was used. In the next place, the language so used was not intended to include, nor in strictness did it include, "all the thousands of men employed by appellant," much less "all the railroad men in the country." The words were: "These railroad men," and Worcester says "these," which is the plural of "this" and opposed to "those," relates to "the persons or things nearest or last mentioned, and 'those' to the most remote or first mentioned." Thus the reference was not general, to all employes of the appellant, but particular and limited, as the context clearly shows, to witnesses whose alleged negligence was the cause of the action against their employer, in whose behalf they were called. The question under discussion manifestly was the weight to be given to their testimony, as affected by their interest in the event of the suit. A striking metaphor was employed to show a deep interest, depending on the power of the big men of the company to discharge them for negligence in the performance of their duties. They are not the only men who hold such a club over their employes. But they certainly have that power, and should use it whenever, in their judgment, the occasion justifies it. The assertion that they have it and use it does not import or imply any fault or wrong on their part, but is rather a commen-

I. C. R. R. Co. v. Beebe.

dation. In the language complained of we perceive no intimation that they are ever guilty of subornation or perjury. Its point is, that all their employes know they have this power and are likely to use it whenever one is convicted out of his own mouth of an act of carelessness in the performance of his duty, which causes the death of a passenger and subjects the company to payment of the consequent damages; and hence an inference of a strong interest and powerful motive to misstate or color the facts which, if shown, would so convict him. In such a statement there would be nothing objectionable.

But in his statement of the power and effect of this interest as a motive, counsel said the witnesses referred to were "compelled" and "must" swear for their job. These terms literally import a moral necessity. The statement was not of matter of fact, but of opinion. Conceding that, taken strictly, it was too strong, even as an opinion, there is little room for a supposition that it was intended to be or was so taken. It is by no means an uncommon form of speech to express the effect of a strong motive or temptation; as where it is said that hunger compelled one to steal, or fear of shame to conceal himself, which are not literally cases of compulsion, but of choice between evils. Here the jury knew that the witnesses could have told the truth if they would, and that counsel also knew it; and counsel was doubtless aware that they knew he knew it; for everybody knows that threatened deprivation of a particular employment does not and can not properly be said to necessitate the commission of willful and corrupt perjury by the employe. We are therefore confident that this verbal inaccuracy did not mislead or improperly influence the jury; and we see no other fault in the language of which so much complaint was made, considered by itself.

But fairness requires us to add that even this inaccuracy was not without provocation. The bill of exceptions expressly states that it was in direct reply to the following statement made by counsel for defendant in the last preceding argument: "The railroad men who testified in this

case are men who have no interest whatever in the case, and are fair and honest witnesses, and you have a right and should give their testimony the same weight and consideration as the testimony of other witnesses."

They testified either that there was no unusual jerking or bumping of the cars in crossing the Alton road, or that they did not observe any such, which was in conflict with the testimony of six witnesses for plaintiff, who were shown to be entirely disinterested, to the effect that there was, and that they did observe it at the time. The question was a very material one, being the foundation of plaintiff's alleged cause of action, and the jury were to decide it according to their judgment of the weight of evidence; and in forming that judgment, the interest of the witnesses in the event of the suit, if any appears, is proper to be considered.

Now the statement above quoted, as to the *status* of the witnesses referred to—at least as to that of the conductor and engineer—and the duty of the jury, were incorrect. While all were alike liable to be discharged for negligence, if shown, and interested to hold their jobs, we do not say there was any evidence of it on the part of the fireman or brakeman, but there clearly was some which tended to inculpate the two first mentioned. If guilty, they would be responsible to the company for all damages resulting from such negligence which it is compelled to pay, and the record in this case would be competent evidence against them. G. & C. U. R. R. Co. v. Welch, 24 Ill. 31; C. & R. I. R. R. Co. v. Hutchins, 34 Id. 108. This was certainly a large interest to defeat the plaintiff. Before the 1st of July, 1872, they would have been disqualified to testify at the instance of the company by reason of it, and the statute which made them competent expressly declares that such interest may still be shown for the purpose of affecting their credibility. Therefore, neither the court nor counsel could properly tell the jury that they "should" give their testimony the same weight as that of other witnesses. These statements being incorrect and prejudicial to plaintiff, it was her counsel's duty to reply to them as forcibly as he fairly could. The

Wall v. Wall.

comparative credibility of these opposing witnesses upon a vital point was a matter of too much importance to be slighted. A good deal of earnestness, and naturally some extravagance of assertion, were to be expected, and here we have them on both sides. But for the reasons stated we think the single fault noted on the part of plaintiff's counsel was too trivial and harmless to amount to misconduct calling for a pointed rebuke. The trial judge was in better position to see his duty under the circumstances than are we, and is entitled to every reasonable presumption that his action was in full discharge of it. His mild admonition had effect to correct the fault and prevent its repetition, which is all that is ordinarily needed in such cases. N. C. St. Ry. Co. v. Cotton, 140 Ill. 502-3, presents some very forcible and pertinent observations on this subject.

We have examined all the Illinois cases and some others cited for appellant on this point, but find none that in our judgment is not clearly distinguishable on principle from the case at bar.

Finding in the record no material error the judgment will be affirmed.

Michael Wall and Alice Wall v. James Wall.

1. **PARENT AND CHILD—Presumptions as to Services Rendered.**—If a child, after arriving at his majority, lives with his parents as before, the law will imply that the relation of parent and child exists, in the absence of circumstances to show to the contrary, and that what was done for each other by the parties created no obligation of indebtedness upon either party.

2. **INSTRUCTIONS—Accuracy Required In Close Cases.**—The fact that the law is stated correctly in some of the instructions will not cure material defects in others, in a close case.

Assumpsit, for services as a farm laborer. Error to the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

C. M. PEIRCE, attorney for Alice Wall, plaintiff in error.

H. S. DOOLEY, attorney for Michael Wall, plaintiff in error.

ROWELL, NEVILLE & LINDLEY and E. E. DONNELLY, attorneys for defendant in error.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error are the parents of defendant in error.

The latter obtained judgment against the former for wages as a farm laborer.

He was unmarried, and though not a minor during the time for which he was awarded a judgment for wages, the relation and actions of the parties were such the law, in the absence of an express agreement, would imply the relation of parent and child existed, and that what was done for each other by the parties created no obligation of indebtedness upon either party. Miller v. Miller, 16 Ill. 296; Brush v. Blanchard, 18 Id. 46; Faloon v. McIntyre, 118 Id. 292.

As tending to show a contract, the contents of a letter addressed to the defendant in error and by him lost was admitted in evidence. It was written by a sister to defendant in error, who was then in Missouri, but in our opinion it did not sufficiently appear from the evidence it was written at the direction or authority of the parents. Moreover, the proof of its contents were vague and uncertain. Altogether, we think this testimony should have been excluded.

He came home and lived upon a farm with his parents and with his brother and sisters, performed farm labor at the request of the parents and was supported and clothed in a manner scarcely distinguishable from that which prevailed prior to his majority.

There was some proof tending to show an intention upon the part of the parents that he should be compensated, and

Wall v. Wall.

defendant in error contends circumstances were proven from which an express contract should be inferred.

But considered altogether, the evidence was conflicting and close, and left the issue involved in doubt.

The first instruction given in behalf of the defendant in error was as follows:

“If the jury believe from the evidence, that the plaintiff performed labor and services for the defendants at their request, and that no price was fixed or agreed upon by them, then the law will imply a promise from the defendants to pay the plaintiff for such work and labor what the same are reasonably worth.”

It was abundantly proven and not denied, the parents directed the defendant in error at divers times to engage in different kinds of work about the farm, and in that sense he did such work at their request.

But such is always true in cases where a child has his home with a parent after his majority and renders services about the affairs of the parent.

The well settled rule is, the law does not, in such instances, imply a promise to pay from a request.

The only other instruction given in the same behalf, having reference to the controlling legal principle involved, was as follows:

“The jury are instructed that if they believe, from the evidence, that the plaintiff has proven by a preponderance of the evidence, either an express hiring, or circumstances from which such hiring or contract may be reasonably inferred, and that plaintiff worked for the defendants under such contract, then the jury should find for the plaintiff, and assess his compensation at such amount as they may believe, from the evidence, said services are reasonably worth.

From these instructions, considered together, the jury would readily arrive at the conclusion a request to perform services was a circumstance from which a contract to pay would be inferred.

The true rule was declared in instructions given at the

instance of the plaintiff in error (defendant below), but the jury were still free to accept the erroneous direction of the court.

For the reason indicated, the judgment is reversed and the cause remanded.

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Terre Haute & Indianapolis Railway Co. v. Cora M. Williams, Administratrix, etc.

1. NEGLIGENCE—*Failure to Perform Duty Required by Law—Who May Sue.*—Whenever a duty arises, whether upon common law or statutory grounds, an action will lie for a breach thereof in favor of any one injured by reason of such breach, though if a mere right is conferred by statute, only those to whom it is specially given may avail themselves thereof.

2. RAILROADS—*Extent of Liability for Failure to Build Fences and Cattle-Guards.*—The statute requiring railroads to build fences and cattle-guards imposes a duty; and liability for a breach of such duty arises whenever an injury is proximately caused by neglect thereof. The specific liability fixed by the statute for stock injured is not exclusive.

3. MASTER AND SERVANT—*Servants Duty to Observe and Complain of Dangers.*—An engineer is not conclusively bound to take notice of all omissions of a railroad company by which he is employed, to maintain the fences and cattle guards required by law, and his failure to complain of such an omission is not conclusive proof that he knew of the defect and realized and accepted the hazard it implied.

4. INSTRUCTIONS—*Statement of a General Rule Not Objectionable.*—A statement in an instruction of the general rule applicable to the case, leaving the opposite party to ask for a statement of any exceptions, limitations or qualifications that may be deemed relevant in view of the proof, is not objectionable.

5. SAME—*When Refusal of, Is Assigned as Error Those Given Should Be in Abstract.*—When only part of the instructions given on a trial are set out in the abstract, this court is not required to pass upon instructions which were refused; because it may be presumed that the instructions given covered the points in those refused.

TRESPASS ON THE CASE.—Death from negligent act. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

T. H. & I. Ry. Co. v. Williams.

T. J. GOLDEN and W. C. OUTTEN, attorneys for appellant.

D. HUTCHISON, ALEX. McINTOSH and JAMES J. FINN, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment against the appellant for \$5,000 in an action on the case for negligently causing the death of Jas. C. Williams.

The declaration alleged that the said Williams was employed as a locomotive engineer in the service of the appellant—that because of the neglect of appellant to maintain fences and cattle-guards, cattle came upon the track, and that the locomotive, in charge of said Williams, colliding with the obstruction was derailed, and thereby his death was occasioned without any fault or negligence on his part.

The evidence showed that cattle went on the track at a point where there should have been a guard and that this was the direct and proximate cause of the accident which resulted in the death of the engineer. The appellant neglected to comply with the statutory requirement in this respect, and the first question to be determined is whether such neglect will create liability for personal injuries sustained by reason of the derailment of a train caused by colliding with animals so coming on the track. Appellant contends that the fencing statute was not enacted to regulate or change the relations existing between the railroad company and its employes, but that its sole purpose is to create a liability for the damages to stock.

In the case of Wabash Railway Co. v. Brown, 5 Brad. 590, the view so contended for was approved. The case was affirmed in the Supreme Court—96 Ill. 297—but no ruling was made on this point. In the recent case of A., T. & S. F. Co. v. Elder, 149 Ill. 173, the court held, without much elaboration or discussion, that a passenger injured in a wreck so caused may recover.

Obviously this conclusion is based upon the proposition

that the statute imposes a duty; that liability arises whenever an injury is proximately caused by neglect of such duty and that the specific liability fixed by the statute for stock damaged is not exclusive.

In other words, whenever a duty arises, whether upon common law or statutory grounds, an action will lie for a breach thereof in favor of any one injured by reason of such breach, though if a mere right is conferred by a statute, only those to whom it is specially given may avail themselves thereof.

In substance, such is the ruling in *Donnegan v. Eberhardt*, 119 N. Y. 468, which overturns *Langlais v. Buffalo, etc., R. R. Co.*, 19 Barb. 364, the authority relied upon in *Wabash R. R. Co. v. Brown*, 5 Brad., cited above. To the same effect are *Dickinson v. O. & St. L. R. R. Co.*, 124 Mo. 140; *Blair v. M. & P. du C. R. R. Co.*, 20 Wis. 267; *A., T. & S. F. R. R. Co. v. Reesman*, 60 Fed. Rep. 370; *M. P. R. R. Co. v. Humes*, 115 U. S. 512.

This view of the statute rests upon the idea that one of its purposes was to prevent obstructions to trains, and thereby add to the security of persons thereon, whether passengers or employes. It was said in *Dickinson v. O. & St. L. R. R. Co.*, *supra*, "Thus, while the statute only imposes upon the corporation, as a penalty for non-observance of the law, double damages for animals killed or injured, the duty to fence is made obligatory. The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all persons upon railroad trains who are exposed to danger by such obstructions, whether they be passengers or employes."

We are persuaded this is a sound and proper view, and supported, as it is by good authority, as well as good reason, we adopt it without hesitation.

This leads to consideration of the point mostly pressed in the brief of the appellant, that the deceased, in his capacity of employe, assumed whatever risk there was by reason of such neglect of appellant, because he knew of the condition of the road with regard to fence and cattle-guards at the

T. H. & I. Ry. Co. v. Williams.

place in question, and continued in the service of appellant without objection. It appears that the place in question was a flag station known as Tabor. There was a switch, some stock pens, an elevator, a grain office, and a postoffice. Tabor was not incorporated, nor was there a plat of lots or streets. On the west side of the railroad the fence which was there before the switch was put in, had been taken out from the south side of a public highway for a space equal to the length of the switch.

At the time of the accident there was no cattle guards south of the space thus left open, so that some cattle which escaped in the night from an enclosure on the east side of the railroad, and north of the highway, wandered down the track to a point south of the switch, and the train upon which the deceased was engineer ran into the cattle and was thrown from the track. This occurred in the early morning, before daylight, and it is not contended that there was any negligence of the engineer contributing to the result. His assumption of the risk rests wholly upon the suggestion that as he had been over the road two or three times a week for three years, and had frequently stopped at Tabor for the purpose of switching cars in or out of his train, he must have known there was no cattle-guard south of the switch. The proposition is, that as he had the opportunity to observe this defect, he must, in law, be presumed to know it, and knowing it, he must be presumed to have accepted the risk. Had the defect been in his engine, or in any appliance that he was required to handle, or work with, then it would be easy and natural to infer with more or less certainty that he knew it. For instance, the presence of a cattle-guard, or a defective condition of the track at a point over which a brakeman must frequently pass in making up trains, may be presumed to be known to him, and so there are many adjudged cases where the court in discussing the evidence concludes that on the facts there presented, a presumption of knowledge clearly arises. But each case must depend upon its peculiar facts.

We can not say that an engineer would necessarily

observe the condition of the fences and cattle-guards at all places, and he might well fail to note the absence of a cattle-guard at a place like that in question. To say the least, he is not conclusively bound to take notice of all such omissions, and his failure to complain is not conclusive that he knew the defect, and realized and accepted the hazard it implied. He might have observed it, and might well have expected it would be remedied within a reasonable time, inasmuch as the statute positively required it should be. He might have noticed it, and yet might not have had reason to believe that it was so dangerous as to require him to complain of it. Knowledge of the fact is only an element having more or less significance according to the circumstances. But it is well settled that a mere knowledge of the defect is not always enough, for there is a distinction between knowledge of the defect and knowledge of the risk from the defect. *Consolidated Coal Co. v. Haenni*, 146 Ill.; 614; *Ill. Steel Co. v. Schymanowski*, 162 Ill. 447.

All these considerations were primarily for the jury, and we are not impressed with the suggestion that their conclusion is against the great preponderance of the evidence, or that it is without support of strong inferences fairly deducible from the evidence. It is complained that the court refused two instructions asked by the defense. These instructions are set out in the abstract, but though it is stated that the court gave five others that were asked, those so given are not set out. As has frequently been ruled, this court is not required to pass upon the instructions so refused; because it may be inferred that the instructions given covered the points in those refused.

We have however referred to the record, and find that such inference is substantially correct in this instance.

The refused instructions were to the effect that if the deceased "was a locomotive engineer, engaged in hauling trains on defendant's railroad track, and was acquainted with defendant's railroad track and right of way at the place of the collision" then the risk thereby caused was assumed by him, and the plaintiff could not recover.

• T. H. & I. Ry. Co. v. Williams.

. As we have endeavored to show, the mere fact of his occupation, and consequent acquaintance with the track and right of way, would not necessarily establish the legal conclusion that he assumed such risk, though it was a circumstance to be considered.

However, as the record shows, the third and fourth instructions given for the defendant advised the jury that before the plaintiff could recover, it must appear that the engineer "did not know of the defect, and had not equal means of knowing with the defendant."

Hence, if the position taken by the appellant upon this point is correct, it has no just cause to complain of the action of the trial court.

It is also urged that the court erred in giving the following instruction (and the only one given) for appellee:

"It is the duty of railroad corporations to furnish reasonably safe appliances for the performance of the work required to be performed by their employes, and furnish a reasonably safe place for the performance of such work as they are required to perform, and this obligation extends to the keeping of their road bed and track free from obstructions that may be dangerous to the persons of such employes in the performance of their duties on such train, so far as the exercise of reasonable care on the part of such railroad corporation can secure such safety."

As we understand it, the criticism is that the instruction should have been modified so as to present the qualification that knowledge of the conditions would bar a recovery.

The general proposition announced is not objected to, but the argument is, that in view of the evidence, the suggested modification was necessary. We think not. There is no objection to such a statement of the general rule—leaving it to the defendant to ask for a statement of any exceptions, limitations or qualifications that might be deemed relevant, in view of the proof.

That aspect of the subject was sufficiently presented to the jury in the third and fourth instructions just referred to, and in one other, the second, given for defendant.

It is lastly urged that the damages are excessive. The deceased was a young man, sound in health and of good habits, and was the sole support of his wife and child, who are the beneficiaries herein.

We can not say the amount allowed, though up to the limit of the law, is too large.

No other objections are presented in the brief of appellant. The judgment will be affirmed.

Joseph Moore v. People of the State of Illinois.

1. CRIMINAL LAW—*Extortion by Threats*.—A threat is a menace and while it must be directly made, it need not be in any particular form or phrase. Any language which conveys the intended meaning with sufficient clearness to be understood, is sufficient.

Indictment, for extorting money. Error to the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

LAWRENCE & LAWRENCE, attorneys for plaintiff in error.

S. G. WILSON, State's attorney, for defendant in error; G. T. BUCKINGHAM, of counsel.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was convicted upon an indictment based on Section 93 of the Criminal Code, which provides that "Whoever, either verbally or by written or printed communication, threatens to accuse another of a crime or misdemeanor * * * with intent to extort money, goods chattels or other valuable thing, * * * shall be fined in a sum not exceeding \$500, and imprisoned not exceeding six months." The indictment charged that the plaintiff in error verbally threatened to accuse one Horace Haworth of larceny with intent to extort, etc. It appears that the prose-

Moore v. The People.

cuting witness and another person were apprehended by the police of Danville late at night on the suspicion that they had stolen a lap robe, but upon the suggestion of the owner of the property they were discharged and permitted to go to their homes some distance in the country. Plaintiff in error, and one Stokes, who were on the police force, were present and knew the circumstances of the arrest and discharge. The prosecuting witness and his companion had been drinking freely and the plaintiff in error and Stokes, taking note of their fears, conceived the plan of extorting one hundred dollars from them as the price of suppressing a prosecution for the supposed offense. Accordingly the plaintiff in error went early the next morning to the home of Haworth and represented to him that he was "going to get into trouble about taking the lap robe," for which he would be sent "over the road;" that Stokes "was raising a big kick" about it, and said they should not have let him, Haworth, go the night before, but that he could stop it for \$100. Haworth said he had not the money, but he had a horse, and plaintiff in error having looked at the animal, agreed to take it at \$60, saying he would go back and see Stokes about it, and if he could get him to settle he would return the next day. .

He did return the next day, bringing Stokes with him, and after some discussion of the matter Haworth gave them the horse and his note for \$40, and they went away.

It is insisted on behalf of the plaintiff in error that there was no evidence of a threat by him to accuse Haworth, but that at most he merely intimated that Stokes would prosecute, unless bought off.

A threat is a menace, and while it must be directly made, it need not be in any particular form or phrase. Any language which conveys with sufficient clearness to be understood the proposition that a charge will be made is enough.

The threat may be bluntly spoken, or it may be thinly veiled in suggestive terms. A brief reference to the testimony will be necessary. Haworth testified that the plaintiff in error appeared at the farm about eight o'clock in the

VOL. 69.]Moore v. The People.

morning, and said he came to tell him that he was going to get into trouble for taking a lap robe for which they would send him over the road; that he was to be arrested for taking the robe; that Stokes was "raising a big kick" about it, and that he and Stokes should not have let them go that night; that Stokes would give him away to the grand jury; that he would be reported to the grand jury unless it was fixed up in some way.

In the second interview Stokes said that he had to live, and if he let such things go, or something like that, they would lose their jobs.

Plaintiff in error was present when Stokes made this declaration. Stokes, who had pleaded guilty, was a witness and testified that he said something to that effect. The plaintiff in error testified in his own behalf. He gave his account of what transpired when Haworth was arrested and discharged, and said he and Stokes had a conversation after the man left, in which Stokes said they ought to have \$100 out of it. The next morning he went to Haworth and found him at his father's barn. He also said (we quote from the abstract):

"I told Haworth I had come down to see him in his behalf; that Stokes had made the remark that he would put him before the grand jury, and it would cost something and he would make something out of it. Mr. Haworth said he had been in trouble enough and he didn't want any more trouble; and I told him Stokes had made the remark he would be damned if he hadn't ought to have something out of it—or a \$100 out of it—and that he made the remark about the grand jury; and I said, if you can settle this, right now is the time to settle it. I says: You don't want to get before the grand jury; he said, I wouldn't go before the grand jury and let my people know what I have done there for all I have got."

Further, he stated that in the second conversation Stokes said he "had to live, and if he did not do his duty he would be discharged, and that he thought it was worth \$100;" that Stokes, after looking at the horse, asked him if he

Moore v. The People.

would take it at \$60, and take Haworth for \$40; to which he assented, and then they went through a bit of play which they had agreed on, by which he gave Stokes his check for \$60.

It is perfectly apparent that the plaintiff in error intended to impress Haworth with the prospect of an accusation if he did not settle, and while, as he put it, Stokes was making the trouble and he was trying to suppress it, yet this was only a way of making the threat, and that he intended Haworth should understand that he and Stokes were acting together, and that unless they were paid the prosecution would proceed. He was a party to it the same as Stokes, and it was so understood by Haworth. It was intended that Haworth should so understand it. Very clearly, the plaintiff in error was guilty, within the spirit of the statute, and, as we think, within the letter. By various forms of suggestion and advice he conveyed a threat of prosecution, and as clearly gave it to be understood that he would co-operate with Stokes therein unless they were bought off.

Complaint is made of the rulings of the court on admission of evidence, and more particularly in excluding certain questions on cross-examination, but on turning to the record, which is more satisfactory as to details than the abstract, we find no just cause for objection.

Some criticism of instructions is also made, but when the whole series is considered in the light of the evidence we find no substantial error.

The main question in the case is whether the evidence (which is not much in conflict on any important point) sufficiently supports the verdict of guilty. If it is necessary to prove a threat couched in so many words, as "I will accuse you if you do not pay me to desist," then the case is not made out. If, however, it is sufficient to show that by any form of expression actually used such a proposition was intended to be conveyed, and was so understood, then it is made out, most amply. We are of opinion the conviction was rightly had, and the judgment will be affirmed.

Prentiss D. Cheney, Adm'r, v. Wm. W. Beaty and A. J. Langley.

1. **EQUITY PRACTICE—Admission of Incompetent Testimony.**—A decree in chancery, when the finding is that of the chancellor, will not be reversed because of the admission of incompetent testimony if there is sufficient competent testimony in the record to support the decree.

Bill for an Accounting.—Error to the Circuit Court of Jersey County: the Hon. GEORGE W. HERDMAN, Judge presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

Thos. F. Ferns, attorney for plaintiff in error.

HAMILTON & HAMILTON, attorneys for defendants in error.

OPINION PER CURIAM.

This was a bill in chancery, filed by plaintiff in error, praying the defendant in error, W. W. Beaty, be required to account as trustee for the said Harriet Beaty, deceased.

The answer, in effect, was a denial that a trust capacity existed, and the assertion the relation was that of debtor and creditor, and that the only indebtedness existing was that represented by two notes given by said W. W. to Harriet Beaty some ten years prior to the filing of the bill.

We are inclined to the opinion it did not appear from the evidence W. W. was trustee for Harriet, but only her agent and debtor, and think the decree of dismissal might well be supported on the ground a court of law was the proper forum.

But waiving this, and excluding from consideration the testimony of W. W. Beaty, upon the ground it, or much of it, was incompetent, we are of opinion the testimony warranted the action of the court upon the other ground of defense, namely, that nothing was due from W. W. beyond the amounts represented by the two notes, and that these notes had been reduced to judgment in a court of law.

Thode v. The Schoenhofen Brewing Co.

It was clearly shown W. W. received moneys belonging to Mrs. Harriet Beaty in a greater amount than the sums mentioned in the notes, but it quite as clearly appeared he repaid considerable sums from time to time, as she needed or requested it.

We think the testimony, considered in connection with the fact of the execution of the notes, fairly justified the conclusion the notes represented the amount due from him.

The fact Mrs. Beaty lived about eight years after the notes were given without making any complaint, no doubt, had weight with the chancellor.

It is to be presumed the chancellor rejected from consideration the incompetent parts of the testimony of W. W. Beaty.

A decree in chancery, where the finding is that of the chancellor, will not be reversed because of the admission of incompetent testimony, if there is sufficient competent testimony to support the decree. Richardson v. Ereland, 126 Ill. 37. Tillotson v. Mitchell 111 Ill: 518.

The decree is affirmed.

Marx Thode v. The Peter Schoenhofen Brewing Company.

1. INSTRUCTIONS—*Failure to Ask for.*—A person who agrees that a jury may be orally instructed can not complain, on appeal, of the failure of the court to instruct on a particular point, when no request was made for an instruction on such point, and the attention of the court was not called to the omission.

2. SAME—*Charge Should be Construed as a Whole.*—Although an expression in an instruction may be subject to criticism, if, when taken in connection with other portions of the charge, it could not have misled the jury, the inaccuracy will not be ground for reversal.

Assumpsit, on a guaranty. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed February 25, 1897.

JAMES F. HUGHES, attorney for appellant.

HORACE S. CLARK and JOHN F. SCOTT, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of \$250 for a quantity of beer sold by the appellee to one Barker, upon the written order of the appellant, as alleged. The case mainly turned upon the question of fact whether the defendant signed or authorized Barker to sign a letter and telegram introduced in evidence. The testimony was conflicting on this point, but nothing appears to justify us in reversing. While a finding for defendant might have been warranted, yet it was chiefly a question of veracity, or perhaps, as to which of the witnesses had the more reliable memory.

We not only can not say that the proof fails to support the verdict but are rather inclined to think the verdict is right. By consent of parties, the court orally instructed the jury. It is now urged by appellant that the charge is erroneous in that it ignores the defense of payment. We do not see that such defense was substantially before the jury.

As already stated, the main question for decision was whether defendant ordered the shipment, and there was apparently no other controversy in the case.

If there was such a defense really before the jury, counsel should have asked the court to instruct in regard thereto. Having failed to make such request, the omission by the court can not be urged as ground of reversal, and more especially so in view of the evidence which does not seem to present anything of substance upon which to predicate such instruction. Williams v. People, 164 Ill. 481.

It is urged that the court did not correctly advise the jury as to the burden of proof. At the beginning the court said that the plaintiff must establish the right to recover by a preponderance of the evidence. Again, it said:

White v. Keady.

“The burden of proof is upon the plaintiff to show the telegrams and letters were signed by the defendant, or that he authorized them to be signed in his name. If you believe from the evidence that the defendant did not sign them, or if you believe from the evidence he did not authorize any other person to sign them for him, then, as a matter of course, he was not bound by them.”

And again: “As I said before, if you do not believe from the evidence that the defendant authorized the telegrams and letters, then the defendant is not bound by them. So far as the receipt of the telegrams or letter is concerned, there is no presumption about it, one way or the other. The plaintiff must show that the defendant authorized the sending of the letter or the sending of the telegrams.”

Counsel dwells upon the expression, “if you believe from the evidence that defendant did not sign, or if you believe from the evidence that he did not authorize any other person to sign them for him,” as casting the burden on defendant.

This expression, if taken alone, would be subject to that criticism; but though inaccurate, when taken in connection with the other portions of the charge, it could not have misled the jury.

The whole charge being read and considered together, as it should be, is not misleading, and sufficiently advises the jury that the burden is on the plaintiff to establish the case alleged, by the weight of the evidence. We can not think the jury misunderstood the rule of law on this point. No substantial error appearing the judgment must be affirmed.

John L. White v. Alexander Keady et al.

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1. FRAUDULENT CONVEYANCES—*Deeds From Husband to Wife*.—A deed from a husband to his wife, made without consideration, is fraudulent as against existing creditors of the husband.

2. HUSBAND AND WIFE—*Ante-Nuptial Contracts*.—An oral ante-nuptial contract is void, as between the husband and his creditors, by

section 1, chapter 59, R. S., entitled "Frauds and Perjuries," but consummation of the marriage and performance of the conditions of the contract will render it valid and effectual as between the parties to it.

3. *SAME.* — *Liens for Money Advanced by the Wife.*—Where a wife gave her husband money which she had earned before her marriage, and he used the same with other moneys of his own in the construction of buildings upon real estate owned by him, *it was held*, in a proceeding to subject the real estate to the payment of his debts, that a lien superior to the right of the creditors of the husband, and in favor of the wife for the money so advanced should be reserved against the property.

Creditor's Bill.—Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded with directions. Opinion filed February 25, 1897.

STATEMENT OF THE CASE.

On the 19th day of January, 1894, appellant brought an action in assumpsit in the McLean Circuit Court against appellee Alexander Keady and others to recover judgment on an indebtedness contracted in 1891, and evidenced by notes dated April 19th of said last mentioned year.

On the 19th day of January, 1894, two days after the institution of said suit, two deeds were placed on file for record in said county.

One of them, dated September 27, 1893, was executed by said Alexander Keady to his brother Samuel B. Keady, and conveyed certain lots in the city of Normal, in McLean county.

The other bore date November 30, 1893, was executed by said Samuel B. Keady and purported to convey the same lots to Mrs. Cora Keady, wife of said Alexander Keady.

Appellant recovered judgment against said Alexander Keady, caused execution to be issued against him, but the sheriff was unable to find property to levy upon to satisfy the judgment.

Appellant thereupon filed his bill in chancery to set aside the conveyances of the town property hereinbefore mentioned, but upon a hearing the bill was dismissed, and this is his appeal prosecuted from the decree of dismissal.

White v. Keady.

The contention of appellant was, the conveyance of the property from Alexander Keady to his brother, and from the brother to Cora, wife of Alexander, were without consideration, and in fraud of his right as creditor of Alexander.

The premises in question consisted of one full lot and one-half of another lot in Normal, on which was a frame residence, the homestead of said Alexander and Cora Keady. The premises were of the value of \$3,500, or thereabouts.

Alexander Keady purchased and received a deed for the lots May 5, 1891, and the residence was erected in the summer of that year, paid for with his money, and occupied by him and his family from thenceforth.

The title remained in him until he executed the deed to his brother in September, 1893, as before stated.

It is conceded no consideration passed upon the execution of this deed, and that the purpose of its execution was to pass the title from the husband through the brother to the wife, Cora, which was accomplished by the deed subsequently executed to her.

Appellees, however, contended this transfer of title from husband to wife was supported by adequate consideration, as follows:

1. That prior to the marriage, as a condition of her acceptance of the request of Alexander to become his wife, he virtually promised her he would provide her with a home in her own right.

2. Soon after the marriage she delivered to him the sum of \$400, which she had earned before her marriage, to be held by him upon the distinct agreement it was to be applied to the specific purpose of aiding in securing a home for her.

3. That her brother, as a gift to her, contributed the sum of \$500 to aid in building the dwelling house upon the lots.

FIFER & BARRY, attorneys for appellant.

OWEN T. REEVES and HARVEY HART, attorneys for appellee Cora S. Keady.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

To state a deed from husband to wife, made without consideration, is fraudulent as against existing creditors of the husband, is but to reiterate the declarations of an unbroken line of judicial decisions.

There is much reason for the view the alleged ante-nuptial agreement did not enter into and form a part of the consideration which moved the appellee Cora to accept the proffer of marriage, and that the conversations out of which the supposed agreement arose were but the expressions of the hopes, desires and future intention of the parties. Moreover, it was but a vague and indefinite promise she should have a home in her own right when the circumstances and convenience of the husband would admit. Nevertheless, if all claimed for it is conceded, it was but an oral ante-nuptial undertaking.

It was therefore void by the express declaration of Sec. 1, Chap. 59, R. S., entitled Frauds and Perjuries.

As between the parties to it, the consummation of the marriage and performance of the conditions of the contract would have made it valid and effectual.

But consummation of the marriage was not within itself sufficient to avoid the effect of the statute (*McAnnulty v. McAnnulty et al.*, 120 Ill. 26; *Richardson v. Richardson*, 148 Ill. 567), and the rights and interest of creditors of the husband intervened before the agreement in question was consummated by performance thereof.

We think the agreement was without efficacy as against the appellant, who was a creditor of the husband at the time he endeavored to divest himself of the title to the premises involved herein. 8 Amer. & Eng. Ency. of Law, p. 684.

It is clear the wife, in her vocation as a teacher of schools, earned \$400 prior to the marriage, and that she gave to her husband that sum to be retained by him and applied to the purpose of constructing a dwelling for a home for her.

It does not appear it is true he kept this identical money received from the wife separate from his funds, but it is

White v. Keady.

not to be doubted he regarded himself as the custodian of that amount of money belonging to his wife, and in his hands for the purpose of applying it to the payment of the costs of the erection of a dwelling house for her.

The equities as to this item are so strong we incline to the view a lien in her favor should be reserved against the property superior to right of the appellant as creditor of the husband. She is not, however, entitled to interest upon said sum under any of the provisions of the statute providing for interest. The husband did not promise to pay interest; it was not in the contemplation of the parties he should so account to her, nor does any rule of equity award it to her.

We are not impressed with the justice of the claim the brother of the wife contributed the sum named as gift to aid in the construction of the dwelling.

He was a carpenter and builder. They applied to him to build a house according to a given plan.

He estimated the cost at a sum some four hundred dollars greater than the amount they desired to apply to the purposes of a dwelling.

After a conference he consented to abate his proposition in the sum named.

Possibly and probably the fact of his relationship operated in some degree to induce him to reduce his bid as a contractor, but we can not conceive the wife obtained thereby any interest in the property which she may assert against a creditor of the husband.

The decree is reversed and the cause remanded, with directions to the Circuit Court to enter a decree that the said conveyance from Alexander Keady to Samuel B. Keady and that from Samuel B. Keady to Cora Keady are fraudulent as against the judgment of the appellant, and that said Cora Keady is entitled to a lien in the sum of \$400 against the premises in said deeds mentioned superior to the lien of the judgment. Appellees are of course entitled to the homestead estate in the property. Decree reversed and cause remanded with directions.

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City of Decatur v. Henry Besten.

1. **SIDEWALKS—Negligence in Repairing a Question of Fact.**—Whether a sidewalk has been out of repair a sufficient length of time to warrant the imputation of negligence on the part of a city is a question of fact.

2. **CITIES—Duty of Keeping Sidewalks in Repair.**—The design of the law is that the sidewalks of a city shall be safe and free from danger, but cities are not charged with the absolute duty of making and keeping their walks safe. They are only required to use reasonable exertion to accomplish that end.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

J. M. LEE, attorney for appellant.

ALBERT G. WEBBER, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee recovered judgment in the sum of \$1,000, for injuries received by a fall upon a sidewalk in the appellant city.

The contention of the appellant city, that it did not appear it had actual notice of the unsafe condition of the sidewalk in question, can not be sustained.

It appeared complaint was made prior to the time appellee was hurt, to Alderman Aphrens that this sidewalk in question was in general unsafe, and that he introduced a resolution in the city council that it be repaired. The information did not perhaps specify the precise defect which caused the appellee to be injured but it was sufficient to attract the attention of the council to the fact the condition of the walk at that point demanded attention.

The testimony of several witnesses was such as to warrant the jury in believing the sidewalk at the place where the

City of Decatur v. Besten.

appellee was hurt had been in bad condition for a period of six months prior thereto, so the other contention, notice of the defect, could not be imputed and must be overruled.

Whether the appellee was in the exercise of ordinary care is much discussed in the briefs.

It was a question of fact, and we are unable to say the jury were manifestly wrong in their decision upon it.

Nor can we say the damages awarded (\$1,000) are excessive. There was testimony tending to show the injury is incurable, and that the appellee may be permanently lame in one leg. Whether the sidewalk had been out of repair a sufficient length of time to warrant the imputation of negligence was a question of fact.

Therefore the court should not have advised the jury, as was done by an instruction, the evidence was sufficient upon the point if it appeared the defect had existed for a period of six months prior to the time of the injury to the appellee.

But surely no one would contend, as a matter of fact, the imputation of negligence would not arise from the existence of a defect for such a period of time when the city, as here, had actual notice the walk was in general in need of attention and repair. Hence the error in the instruction is not within itself such as to demand a reversal of the judgment.

We do not think ground for reversal exists because of the declaration in another instruction given for the plaintiff below, that it was the duty of the city to use *all* reasonable care to the end the sidewalk should be reasonably safe. The criticism upon it is, "*all* reasonable care" is a higher degree of care than merely reasonable care.

The design of the law is, the sidewalks of a city shall be safe and free from danger. The city is not, however, charged by law with the absolute duty of making and keeping its walks safe, but is required to use reasonable exertion to accomplish that end. It may omit nothing that reasonable diligence and care would demand. Hence *all* reasonable care is within the rule of duty.

The sidewalk was within the corporate limits, and the obligation of the city to exercise ordinary care and prudence to keep it in a safe condition, our Supreme Court has declared, was not lessened or changed by the fact it was not as much in use as walks in more frequented streets. *City of Flora v. Nanney*, 136 Ill. 48.

The action of the court in giving, refusing and modifying instructions was in harmony with the principles announced by our Supreme Court in the case cited.

The fourth refused instruction was fully covered by the ninth, which was given.

Instructions Nos. 8 and 10, which were refused, were, so far as proper to be given, repetitions of principles announced in Nos. 6, 7 and 14, which were given.

We do not find error of reversible character. The judgment is affirmed.

Baltimore & O. S. W. Ry. Co. v. L. D. Higgins.

1. **VARIANCES—*In a Description of Land.***—In a suit for damages to land caused by fire started by sparks from a locomotive, giving the name of the township in which the land is situated is needless particularity in the description, and a variance in that regard will not vitiate the judgment where no objection was made on that account.

2. **SAME—*In Proving the Name of a Railroad Company.***—It is common practice to designate railroads by initials or short names, and in a suit against a railroad company, if the name in common use be employed by the witnesses, it can not be objected on appeal that the name of the company was not proved as alleged. Such an objection should be made on the trial.

3. **EVIDENCE—*Of Ownership of Land.***—Possession of land for twelve or fifteen years is sufficient evidence of ownership in a suit against a wrongdoer for damages thereto, and the introduction of a deed conveying a half interest in the land to the plaintiff does not vitiate such evidence.

4. **NON-JOINDER—*When it Must be Plead in Abatement.***—In actions for torts the non-joinder of persons interested with the plaintiff must be plead in abatement and can not be taken advantage of on the trial otherwise than in mitigation of damages.

B. & O. S. W. Ry. Co. v. Higgins.

5. INSTRUCTIONS—*Harmless Inaccuracies*.—A court of appeal will not reverse a judgment for inaccuracies in instructions when it is plain that under the evidence such inaccuracies could have done no harm.

Trespass on the Case, for damages caused by fire set by sparks from an engine. Appeal from Circuit Court of Christian County; the Hon. JACOB FOCKE, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

DRENNAN & LESTER and HOGAN & DRENNAN, attorneys for appellant.

SHARROCK & SHAMEL, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the appellant for \$210, in an action on the case for damage to the hedge fence of appellee, by fire escaping from a locomotive engine to the right of way, which was foul with weeds and dry grass, and thence to the hedge. The first objection is that there is a variance (as to the location of the farm) between the allegation and the proof. The declaration averred the land was in Locust township, Christian county, and one of the witnesses testified it was in Rosemond township. No motion was made to exclude the evidence on the ground of variance. An instruction was asked that if the land mentioned in the declaration was in Rosemond and not in Locust township the jury should find for defendant, which the court refused.

It does not appear that the attention of the court or of the plaintiff was directed to this variance and probably it was not. Had this been done the objection, if any, could and no doubt would have been obviated. From an examination of the official railroad map it would seem that the land must be in Locust township, as the line of the railroad crosses the extreme northeast corner of Rosemond township at the southeast corner of Locust and then runs diagonally through the latter. Either the witness was mistaken or the stenographer misunderstood him, if this be the case. At any rate the matter did not attract the attention of court or

VOL. 69.]B. & O. S. W. Ry. Co. v. Higgins.

counsel and under such circumstances we are not disposed to reverse for that cause. Giving the township was needless particularity in the description, and the variance is too trivial a matter to vitiate the judgment, especially in view of the fact that no objection was openly made on that account.

The next objection is that the name of defendant company was not proved as alleged. The witnesses spoke of it as the Baltimore & Ohio, or the B. & O., and one of them as the O. & M. It is habitual to designate railroads by initials or some short name. This is so in common conversation, as well as in the official advertisements of the railroad companies. It is a matter of common knowledge that the letters O. & M., referring to a railroad, designate the Ohio & Mississippi, which has been succeeded by the Baltimore & Ohio Southwestern, the latter being generally designated by letters B. & O., or B. & O. S. W. In this instance the stations Millersville and Owanico, were also mentioned as to the location of the railroad, so that no question as to its identity was possible. But were this not so, when the road was mentioned by initials, both sides evidently knew what was meant, and if counsel for the defendant desired any further identification or designation, some objection should have been made at the time.

It is next urged that the ownership of the land was not proved as alleged. The plaintiff first offered in evidence a deed for the undivided one-half of the land. The witness Reed testified that he was occupying the land under a lease from the plaintiff, and had been for twelve or fifteen years. Such possession was enough to show ownership in the plaintiff for the purposes of this case, and while the additional evidence of a deed conveying one-half of the land did not strengthen the title, it did not weaken it. The possession of plaintiff ante-dated the deed and the latter might well have been omitted from the proof. *Herbert v. Herbert*, Breese R. 354; *Keith v. Keith*, 104 Ill. 397; Adams on *Ejectment*, 4th Ed., 137-324 2 Gr. Ev., Sec. 309.

Assuming the evidence showed that the plaintiff owned

B. & O. S. W. Ry. Co. v. Higgins.

only half of the land, the defendant asked the court to instruct the jury that unless the plaintiff was the sole owner, the verdict should be for defendant, which the court properly declined to do. In actions for torts the non-joinder of persons interested with the plaintiff must be pleaded in abatement, and can not be taken advantage of on the trial otherwise than in mitigation of damages. Edwards v. Hill, 11 Ill. 22; Johnson v. Richardson, 17 Ill. 302; 1 Ch. Pl. 66.

If defendant desired to insist upon the fact that the plaintiff was not the sole owner the proper course was to urge a reduction of the damages. It was competent for the defense to attack the *prima facie* case of ownership made out by proof of possession, but this was not attempted. We think this objection must be overruled.

It is next objected that the proof fails to show the fire originated on the right of way, as alleged in the declaration. The witness Withem was waiting for the train to pass, and immediately after it passed he saw the fire within five or six feet of the ends of the ties. He tried to put it out but failed and it spread to the hedge. The right of way is fifty feet in width, the track being in the centre. This proof, which is not contradicted, sufficiently supports the allegation as to the point where the fire began.

It is next urged that the damages are excessive. According to one witness at least 150 rods were wholly destroyed. Another said 160 rods. Another fixed the amount wholly destroyed at 190 rods, and in addition there were some portions more or less injured.

The part so destroyed was worth one dollar per rod. The whole string of 230 rods was practically useless for the purpose of a fence. The attorney fees were shown to be worth \$35, which, being deducted from the amount of the verdict, leaves \$175 for the damage to the hedge, which is quite within the range of the proofs.

We have found the abstract not very satisfactory as to details and have examined the record. After a careful reading of the testimony it is apparent the verdict is supported upon all points. The defendant offered no proof.

VOL. 69.]Prudential Ins. Co. v. Hite.

The court properly denied the motion to withdraw the case from the jury and properly refused the motion for new trial. Objection is taken to the first instruction for plaintiff because it informs the jury that defendant was liable if fire escaped from the engine, whether this was the cause of the injury or not. Upon reading the instruction we hardly consider this a fair criticism, but as the evidence clearly showed that the injury did result from fire escaping from the engine to the right of way, which was foul with dry weeds and grass, the point is not important.

An objection urged to the third instruction for the plaintiff is, that it assumes there was damage, which may be answered the same way.

No substantial error appears in the record, and the judgment must be affirmed.

Prudential Insurance Company v. Byron Hite.

1. CONTRACTS—*Stipulations as to Actions Thereon*.—A provision in a contract of employment stipulating that the servant shall commence no action relating to the employment until ten days after notice of the particulars of his claim shall have been served on the master, is valid, and the servant can not recover for services rendered, without proof of the giving of such notice.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

MABIN & CLARK and M. C. HAMILL, attorneys for appellant.

EVANS & BECKWITH, attorneys for the appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee acted as soliciting agent for the appellant com-

Prudential Ins. Co. v. Hite.

pany under a contract in writing and brought this action to recover compensation for his services under the terms and conditions of the contract.

Paragraph fourteen of the contract provides "That no suit at law or in equity relating to my employment as agent shall be maintainable until ten days shall have expired after service on the president or secretary of the company of a written statement of particulars and amount of my claim against the company, nor after six months from the date of the official transfer of the business obtained by me for the company, any statute to the contrary notwithstanding."

The action was brought without having first furnished the written statement of particulars and amount of the claim.

The court ruled the written contract alone could be relied upon to determine the agreement between the parties, but excluded paragraph fourteen from the consideration of the jury.

It does not appear from the record upon what ground the court ruled the paragraph was inoperative.

Counsel for appellee say that under the doctrine announced in Vogel et al. v. Pekoc, 157 Ill. 339, the paragraph was void for want of mutuality.

In that case the contract provided Pekoc should not quit the service of Vogel without first giving two weeks' notice in writing, and that a deposit of \$25, to be created by a retention of wages, should be made by Pekoc, to be retained as liquidated damages in case of non-compliance with the contract in this respect. Pekoc earned \$25 in the service of Vogel, left the service without notice, and brought suit to recover the amount he had earned.

Vogel interposed as a defense that he was entitled to the sum earned as liquidated damages by virtue of the contract.

The court construed the contract to impose no obligation on Vogel to employ Pekoc, or to pay him anything, and to be so framed that no action for damages for a breach thereof could be maintained upon it by Pekoc.

Hence it was ruled the contract was void for want of mutuality.

In the case at bar the contract provides for the employment of the appellee in the service of the company, and fixes his compensation.

The compensation was to be determined by way of percentages upon the amount received for premiums paid to the company, but the contract established the legal right of appellee thereto, and is enforceable against the company according to its terms and conditions.

There was no want of mutuality in the contract, taken as a whole, and it is not distinct or independent in any of its parts.

It contained no provision making it obligatory upon the company to furnish a written statement of particulars "to appellee before a right should accrue to it to institute an action against him." But it is not the rule that a contract must be reciprocal as to each and every separate obligation.

It is sufficient if upon the whole contract both parties are legally obligated to abide by and perform its conditions.

Such an obligation furnishes consideration and mutuality for the several undertakings of the parties to the contract.

It does not appear, nor is it suggested, the stipulation of the paragraph in question is against public policy or in conflict with any requirement of law.

The parties had full power to contract as to the details of their business affairs and relations, and the court had no function to perform other than to enforce as between them the contract as they made it.

The paragraph in question constituted a condition precedent to recovery. *Prudential Ins. Co. v. Meyers*, 44 N. E. Rep. 55.

The judgment must be and is reversed, and the cause remanded.

Faith v. Taylor.

Charles Faith v. Wm. H. Taylor.

69 419
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1. **LANDLORD AND TENANT—*Permission to Tenant to Sell Crop Waives Lien.***—If a landlord authorizes a tenant to sell the crop raised on his land, and a purchaser is aware of this fact, he may make payment to the tenant, and if he does so will not be liable to the landlord.

Trespass on the Case, for impairment of a lien. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

W. E. REDMON, attorney for appellant.

MILLS BROTHERS, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action on the case, in which the plaintiff alleged that, being the owner of certain land, he leased the same to one Lill for certain rent to be paid in money; that the said Lill raised a quantity of corn on the land upon which the plaintiff had a lien for his rent, and that while said lien was subsisting, the rent being due and unpaid, said Lill sold the corn to defendant, who well knew that Lill was the tenant of the plaintiff, and that the corn was raised upon the demised premises; that defendant converted the corn to his own use, and thereby plaintiff was deprived of his lien, wherefore he sought to recover the value of so much thereof as would be necessary to pay the rent.

The defendant pleaded the general issue, and upon trial by jury there was a verdict for \$254.80, upon which judgment was rendered. The defendant has appealed.

The evidence sufficiently established the allegations of the declaration as to the tenancy, and the knowledge thereof by the defendant at the time of the purchase, but the defense relied upon was that the plaintiff, after his rent was due, authorized the tenant to sell the corn, and that defendant knew that fact when he bought. Is this a defense? In the case of Finney v. Harding, 136 Ill. 573, the Supreme Court

held, that under our statute the landlord having no right of property in the crop raised by the tenant, and no right of possession by virtue of his mere lien, can maintain no action against the purchaser except for a fraudulent act intended to impair the lien. The gist of the right of recovery is declared to be the wrongful or tortious act of defendant, or the omission of some legal duty, in consequence of which injury has resulted to the plaintiff.

In that case, for the first time, the question was directly presented whether an innocent purchaser without notice was liable to the landlord, and it was answered in the negative.

In view of the doctrine thus announced, which is well supported by the authorities cited, it seems very clear that where the landlord authorizes the tenant to sell and receive the proceeds, and where the purchaser is aware of the fact, there can be no recovery.

In such case there is no fraudulent act by the purchaser calculated to impair the landlord's security—nothing wrongful or tortious. When the landlord permits the tenant to sell, he permits him to receive the purchase money. Though the purchaser knows of the landlord's lien, yet he knows also that the tenant is selling with such permission, and in paying the money to him he is doing no more than the landlord has authorized. To allow the landlord to hold him, under such circumstances, would be unjust and inequitable. The judgment will be reversed and the cause remanded.

Edward Carter v. James Penn.

1. APPELLATE COURT PRACTICE—*Errors not Argued Deemed Abandoned.*—Errors formally assigned will be considered as abandoned where the appellant fails to mention them in his brief.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Tazewell County; the Hon. NATHANIEL W. GREEN, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

Carter v. Penn.

PRETTYMAN & VELDE, attorneys for appellant.

HAMMOND & WYETH, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellant operated a coal mine; appellee was in his employ, and while engaged in repairing a signal wire in the shaft of the mine, was struck and injured by an ascending cage.

He obtained judgment against appellant in the sum of \$300, upon the ground the cage was put in motion through the personal negligence of the appellant.

The only alleged error pointed out and discussed in the brief for the appellant is, the verdict of the jury was against the evidence.

Other errors were formally assigned, but are deemed abandoned by reason of the failure to rely upon them in the brief.

We have carefully read and considered the testimony and the argument of counsel thereon.

There seems no substantial ground for the contention that appellee was not in the line of his duty at the time, or that he failed to exercise ordinary care for his own safety.

The jury, in answer to a special interrogatory, found the injury was the result of the personal negligence of appellant.

This was the frictional point of fact.

The evidence was conflicting. After mature consideration we are of opinion we would not be authorized in saying the verdict and judgment is manifestly wrong.

There appears no reason we should extend the opinion by entering upon a discussion of the testimony.

The judgment is affirmed.

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Henry A. Gardner v. Mary C. Girtin, Administratrix, Etc.

1. **DEPOSITIONS—Who is a Non-resident.**—A non-resident witness, within the meaning of section 28, chapter 51, R. S., entitled, "Evidence and Depositions," is one who does not reside in or is not a resident of a particular place, either within or without the State.

2. **PRACTICE—Opening and Closing.**--It is within the discretion of the court to permit the defendant to open and close whenever during a trial he assumes the affirmative, and the mere fact that the general issue is not withdrawn until after the jury is chosen and some evidence taken makes no difference.

3. **SALES—For Future Delivery—When Void.**—A sale of goods to be delivered in the future is valid, though there may be an option as to the time of delivering, and though the seller had no other means of getting them than of going into the market and buying them, but if, under the guise of a contract, valid on its face, the real purpose and intention of the parties be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the loser is only to pay the difference between the contract and the market price, then the transaction is a wager and is void.

4. **PROMISSORY NOTE—Founded Upon a Wager, Void—Innocent Purchaser.**—A promissory note given upon such an illegal consideration is, under our statute, void in the hands of an innocent purchaser, and such illegality of a part of the consideration will taint the whole.

5. **INTENTION—Of Parties—How Established.**—The intention of the parties to a contract may be established not only by their assertions but also by the attending circumstances.

Assumpsit, on a promissory note. Error to the Circuit Court of McLean County: the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed February 25, 1897.

F. R. HENDERSON and E. E. DONNELLY, attorneys for plaintiff in error.

J. J. MORRISSEY, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was assumpsit upon a promissory note for \$1,000, signed by Jno. J. Girtin and Wm. C. Girtin, payable to

Gardner v. Girtin.

Nash, Wright & Co., ninety days after its date, September 6, 1889.

The note was indorsed to the plaintiff Gardner. There was no service upon the defendant John J. Girtin. The defendant Wm. C. Girtin made the defense that the note was given for the consideration of a balance due the payees upon certain transactions on the board of trade, in Chicago, which were in violation of the statute against option dealing in grain, and was void for that reason.

There was a verdict and judgment thereon in favor of defendant, and the plaintiff has brought the record here upon a writ of error, making the administratrix of said Wm. C. Girtin, who has since died, party defendant thereto.

It is assigned as error that the court suppressed certain depositions taken by the plaintiff. This involves the proper construction of Sec. 28 of Ch. 51, R. S. The plaintiff had given notice that he would sue out a commission to take the depositions of certain named witnesses residing in this State, more than one hundred miles from the place of holding court, upon written interrogatories, pursuant to section 26, and the defendant gave notice under section 28 of his election to have the deposition taken upon interrogatories to be propounded orally, but the plaintiff, conceiving that the last named section is not applicable where the witness resides in this State, obtained a commission to take the depositions upon the written interrogatories, and it was so done; wherefore the court sustained the defendant's motion to suppress.

What is meant by the term "non-resident witness," as found in the second line of Sec. 28?

A non-resident is one who does not reside in or is not a resident of a particular place. One may be a non-resident of the United States or of a State, or of a county, or of any particular place. It is contended by plaintiffs in error that the term as used here refers to one not residing in the State. It may as well refer to one not residing in the county, and there is as much reason for giving the right to oral examination where the witness resides in the State as where he

resides beyond. It would seem strange that the privilege should be accorded in the one case and denied in the other. By Sec. 25, when the witness resides out of the county, his deposition may be taken orally.

Using the term non-resident in its primary and general sense, indicating one who is not a resident of a particular place, makes the provision applicable whether the witness is in or out of the State which, we have no doubt, was the purpose of the Legislature. We are therefore inclined to agree with the ruling of the court on this point. The plaintiff made no motion for a continuance in order to retake the testimony or to obtain the attendance of the witnesses, but went to trial and produced two of the witnesses in person. These witnesses so produced seem to have been the most important and their testimony covered the whole subject, generally and in detail, upon which all of the witnesses whose depositions were taken were examined. It is not apparent that the ruling of the court, if erroneous, caused the plaintiff any particular harm.

It is a common practice where a deposition is suppressed to ask for time in which to retake it or obtain the presence of the witness, and in case the party has acted in good faith, though upon a mistaken view of the law, the court will in its discretion grant reasonable delay. In this instance where the point involved was the construction of the statute, upon which difference of opinion might well arise, such an application would no doubt have been entertained. Had it been made and denied, and the party thereby deprived of material testimony, he would have been in better position here. Not having done so we are disposed to hold that even though the court may have been mistaken in its construction of the statute the judgment should not be reversed for that cause.

Another objection is that the court permitted the defendant to open and close the argument to the jury. This is based upon the fact that defendant did not withdraw his plea of the general issue until after the trial had begun, when he was permitted to do so and rest his defense upon special pleas in which he assumed the affirmative.

Gardner v. Girtin.

In the case of *Goetz v. Sona*, 65 Ill. App. 78, we held that it is within the discretion of the court to permit the defendant to open and close whenever during the trial he assumes the affirmative, and the mere fact that the general issue is not withdrawn until after the jury is chosen makes no difference. We are disposed to apply the rule in this case, where some evidence had been taken before the general issue was withdrawn, and therefore overrule the objection. The chief question in the case is one of fact; that is, as to the character of the transactions between the parties. It appears that John J. Girtin was without means and was furnished with money and credit by Wm. C. Girtin, his brother, in the business of buying grain at Towanda—shipping and selling through Nash, Wright & Co., a commission firm of Chicago. This began in 1857. The transactions were small and at first were strictly legitimate, being confined to the purchase and shipment for sale of corn and oats. In a short time however he began to speculate on the board of trade through this firm, and while he continued to buy and ship grain, yet the speculative feature of their transactions became the more important and resulted in very heavy losses to him. The note in suit is, no doubt, directly or indirectly, based upon these losses; that is to say, it was directly given for margins, or for a balance due because of money advanced by Nash, Wright & Co. for margins in these speculative transactions.

The dealings between the parties are so commingled that it would require much time and space to point out those which were strictly on account of grain actually shipped by Girtin to Nash, Wright & Co., and by them sold for him, and those which were exclusively on account of grain bought and sold on the board of trade, and, as stated, the losses in these latter were large, aggregating very much more than the amount of the note in suit. The testimony offered by the defense was to the effect that in these speculative deals there was no intention or expectation that the grain should be delivered, but the purpose in every instance was to settle by the differences.

These trades during the last year involved hundreds of thousands of bushels and were all on margin and all adjusted without the receipt or delivery of grain, either in specie or by warehouse receipt. The plaintiff proved that in every instance the buyer or seller had the right to receive or deliver the grain, and that it was merely a matter of choice or convenience to settle, as was done uniformly, by the differences, and that there was never any design to violate the statute. It is not necessary here to discuss the law applicable in such cases.

It has been so often announced that we need do no more than state the rule that a sale of goods to be delivered in the future is valid though there may be an option as to the time of delivering, and though the seller had no other means of getting them than of going into the market and buying them, but if under the guise of such a contract, valid on its face, the real purpose and intention of the parties be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the loser is only to pay the difference between the contract and the market price, then the transaction is a wager and the contract is void. A promissory note given upon such illegal consideration is, under our statute, void in the hands of an innocent holder. *Pope v. Hanke*, 155 Ill. 617.

Such illegality of the part of the consideration would taint the whole. *Tenny v. Foote*, 95 Ill. 99. *Miles v. Andrews*, 40 Ill. App. 155. In this instance it appears the note was transferred without recourse to the plaintiff after maturity.

The intention of the parties may be established not only by their assertions but also by the attending circumstances. We have carefully read the evidence as presented by the abstract, which is very full, as stated by counsel, and we are satisfied the jury were warranted in reaching the conclusion they did upon the main issue before them. It is improbable, not to say incredible, that in all these deals there was any intention to handle the actual grain. John J. Girtin was utterly unable to do so, and so probably was his brother,

Gardner v. Girtin.

who was merely aiding him with money and credit. This was no doubt known to the commission men, who were mainly interested in their commissions, regardless of the results to Girtin. A perusal of the communications between the parties and a consideration of all the circumstances in proof can lead to but the one conclusion, as we think, that these transactions were all illegal and void because the real purpose was merely to speculate in the rise and fall of prices, with no intention to receive or deliver the grain, but merely to pay or receive the difference between the contract price and the market price. Much criticism of the rulings of the court on the admission and rejection of evidence and of its comments in so doing is found in the brief of plaintiff in error. Without going into these matters in detail we think it enough to say that we find nothing very substantial therein. The evidence necessarily took a wide range and the jury were put in possession thereby of the whole affair, so far as susceptible of proof, but we find nothing irrelevant introduced to the prejudice of the plaintiff. Any errors there were are of not such importance as to vitiate the judgment. As to the action of the court in giving, refusing and modifying instructions there is also much complaint.

As frequently happens, there were too many instructions, at least more than was necessary, and there was much repetition, in varying form and with more or less of argument. The series offered on each side was faulty in these respects. After an examination of all that was thus given by the court to the jury we are of opinion that, in view of the evidence and of the issue presented, the jury were not misled and that the plaintiff was not prejudiced in any substantial degree by the instructions given for the defendant when considered in connection with those given for the plaintiff.

On the whole we are of opinion the judgment is responsive to the merits and that there is no such error in the record as should cause a reversal.

It will be affirmed.

James K. Rawley v. Kate S. Murray.

1. PRACTICE—*Setting Aside Default and Granting New Trial*.—Where an attorney was notified that a case was set for trial on the day previous to the trial, and it does not appear that he made any preparation for trial, that he had not time for that purpose, that he made reasonable application to the court for delay, or that he was unable to attend the trial, was the sole attorney for the defendant, and that there was not time to secure another, a motion to set aside a default and grant a new trial is properly overruled.

Covenant, on a warranty deed. Appeal from the Circuit Court of Christian County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

DRENNAN & HOGAN and J. H. YARNELL, attorneys for appellant.

J. C. McQUIGG, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was an action of covenant on warranty deed brought by Kate S. Murray, since deceased, against the appellant.

Pleas were filed and the cause being at issue was called for trial, and the defendant not being present, a jury was impaneled, the evidence of the plaintiff was heard, and nothing being offered on the part of the defendant, the court instructed the jury to find for the plaintiff. A verdict was rendered accordingly.

Afterward, the defendant moved for new trial upon several grounds, one of which was embodied in the affidavits of himself and his attorney. The affidavit of the defendant was to the effect that he had a meritorious defense and had employed counsel to represent him, and that the case was called in the absence of himself and his attorney, they never having received notice of the setting of the case for trial.

The affidavit of the attorney was to the effect that the

Rawley v. Murray.

case was set for trial when he was not present, and without any agreement on his part; that the plaintiff's attorney had agreed not to have the case set without notice to the parties; that he received no notice of the setting until one day prior to the trial and had no opportunity to arrange for a resetting of the same; that he was sick and unable to be present in court on the day of trial, and that he sent a telegram to another attorney asking him to procure a resetting of the case, which telegram was read to the court but the court refused to reset the case and it proceeded to trial in the absence of the defendant and his attorney; that the defendant had a meritorious defense, and that the damages were excessive. There was also an affidavit by a physician that the attorney was at the time sick and unable to leave home.

It is not shown by these affidavits that proper diligence was exercised by the defendant or his attorney.

While the latter knew the case was set for trial one day in advance, it does not appear that he made any preparation for trial—that he had not time for that purpose—or that he made reasonable application to the court for delay. If he was sick and could not attend he might have caused the defendant to go, and, if necessary, procure another attorney. It does not appear that he was the sole attorney for defendant, and that there was not time to secure another. What he did was merely to send a telegram to another attorney, whether employed in the case not appearing, on the day of trial, asking him to obtain a resetting. While it is said this telegram was presented to the court it is not shown what it contained, nor that the court had any way of knowing what credence to give it.

We think there is no reason to say that the court erred in refusing to delay the trial, or to grant a new trial for the cause set forth in these affidavits.

It is urged the evidence does not support the verdict. A general warranty deed such as alleged in the declaration was produced, and it appeared that prior to its date one-half of the lot thereby conveyed had been appropriated by

a railroad company for its right of way, etc., under condemnation proceedings, and that the plaintiff had thereby lost that part of the lot. The value of the property thus taken was proved. The evidence thus produced was sufficient to establish the plaintiff's case, and in the absence of proof to the contrary the verdict was necessarily for the plaintiff. The court properly so instructed the jury, which was the only instruction given.

The defendant, in support of the position that the verdict was excessive, offered the affidavit of two witnesses to the effect that the said half lot was worth considerably less than the amount of the verdict, and he so stated in his own affidavit already referred to. If we are correct in saying that he did not use proper diligence to be ready for trial or obtain a delay, then of course this point is not well made. Had he been duly vigilant he would have been able to produce this testimony on the trial, and perhaps the plaintiff would have been able to meet it. The verdict is supported by the evidence before the jury. No error appears in the action of the court in refusing a new trial. The judgment will be affirmed.

**James R. Ross, Henry C. Thompson and Henry C. Knodle
v. A. R. Cox and William Greenwell.**

1. INJUNCTIONS—*To Restrain the Collection of Judgments—Application of the Statute.*—Under the statute "only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay," so that if a complainant be unable to establish a defense, in whole or in part, against the claim on which a judgment is founded, the statute forbids an injunction.

Bill for an Injunction.—Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

H. S. TANNER and HARBAUGH & WHITAKER, attorneys for appellants.

Ross v. Cox.

JOHN R. & WALTER EDEN, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellees executed two notes, each payable to the appellants as partners under the firm name and style of Jas. R. Ross & Co.

The notes each contained a warrant of attorney authorizing the confession of judgment thereon.

Appellants caused a judgment on the notes to be entered by confession in the Circuit Court of Moultrie County, but on subsequent application of the appellees, it was opened and pleas to the merits filed in defense. Pending a hearing, appellants dismissed the action.

Afterward they caused a second judgment to be entered in Coles county by confession, in virtue of the warrants of attorney, and procured execution to be issued thereon and levies to be made on land belonging to appellees.

This was a bill in chancery to enjoin a sale of the lands levied on and also to restrain the issuance of other executions thereafter, and to vacate the judgment.

Answer and replication were filed and the testimony produced by the respective parties upon the merits of the controversy heard by the court.

The court ruled the entry of the judgment by confession in Moultrie county exhausted all power conferred by the warrants of attorney, and that the judgment afterward entered in virtue of the same warrants, and which the bill sought to enjoin, was for that reason void and should be vacated, and decreed it be vacated and the execution and levy thereof quashed.

Sec. 7, Chap. 69, R. S., entitled Injunctions, provides: "Only so much of any judgment at law shall be enjoined as the complainant shall show himself not equitably bound to pay, and so much as shall be sufficient to cover costs." In Colson v. Leitch, 110 Ill. 504, it was said:

"The right of injunction, it will be borne in mind, is not against the whole judgment because of any error in its

rendition, but only against so much of it (*i. e.* that part of the amount of which) as he shall show himself equitably not bound to pay. In short, the right to enjoin is because that which is claimed to be owed is in equity not owed, and not because of the form it has been made to assume."

In the case at bar the appellees invoked the aid of a court of equity, and therefore the question submitted to the court was whether they were equitably bound to pay the whole or any part of the amount sought to be collected by virtue of the execution and judgment.

Whether the warrants of attorney were legally sufficient to justify the rendition of the judgment was wholly unimportant.

The court should have determined from the testimony whether the appellees were equitably indebted to the appellants in the amount of the whole or any part of the judgment and entered its decree accordingly.

The parties were entitled to the judgment of the chancellor upon the proofs submitted.

We can not substitute our judgment thereon but can only order the decree be reversed and the cause remanded.

The Wabash Railroad Co. v. William Randol.

1. **RAILROADS--Duty to Fence Right of Way--Adoption of Fence Erected by Owner of Land.**—It is the duty of a railroad company to build and maintain a fence along its right of way suitable and sufficient to prevent stock from going upon its track, and if it does not do so, but joins a fence built at other points to a fence previously erected by a land owner near to the right of way but on his own land, it adopts and appropriates his fence and must see that it is, and continues to be, sufficient for the purpose. Failing in this it is responsible precisely as if it had built such fence.

2. **PRACTICE--Objections to Allowance of Attorney's Fees.**—In a suit against a railroad for injuries caused by its failure to fence its right of way, objections to the allowance of attorney's fees, on the ground that they are not claimed in the declaration, should be made when evidence of such fees is offered.

Wabash R. R. Co. v. Randol.

Trespass on the Case, for injuries to stock. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed February 25, 1897.

COCHRAN & MILLER, attorneys for appellant.

HARBAUGH & WHITAKER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for damages by reason of stock killed, the negligence alleged being a failure to maintain a sufficient fence along the right of way, as required by the statute. The stock killed consisted of three horses and two hogs. The defendant claimed the hogs did not get on the track by reason of the defective fence. It is not certain the verdict included an allowance for them, inasmuch as the amount awarded is entirely within the range of proof as to the value of the horses.

As to these it was insisted below, and is here, that though they got on the track through a defective fence, yet the defendant was not responsible, because the fence was built by the plaintiff and defendant had no knowledge it was defective.

It was testified by the plaintiff that some seven years before, the defendant had no fence along the right of way at that point, and being the owner of the adjoining land he built this fence for the purpose of enclosing his garden, and built it on his own ground, some two or three feet from the outside line of the right of way, he having previously, without avail, requested the defendant to fence. Afterward the defendant did build a five-wire fence along the right of way north and south of the plaintiff, and joined to his fence, which remained the only barrier between him and the right of way at that point. It was an ordinary picket fence, suitable for a garden. Later, he moved his residence to a different part of his land, provided another garden, and took away the inner fence of the old garden, thereby throwing that piece of ground into the field. His horses being in

this field passed through a gap in the fence (which fell or was pushed down, the posts having become rotten) to the right of way and were struck by a train which soon afterward went over the road.

There is substantially no denial of the facts as thus stated by the plaintiff. It was the duty of the defendant to build and maintain a fence along its right of way at that point suitable and sufficient to prevent horses, etc., from going on the track. It did not do so, but joined a fence it built at other points to this fence of the plaintiff, which was on his own land. By doing so it adopted and appropriated his fence, and should have been careful to see that it was, and continued to be, sufficient for the purpose. Failing herein it should be responsible precisely as if it had built the fence. It can not be said with reason that the plaintiff assumed the defendant's duty of building and maintaining such a fence as the law requires. He built a fence on his own land, for his own purposes, and because he made no objection when the defendant joined it, he did not thereby release defendant from its duty in that behalf.

The cases cited in the brief of appellant on this point are Ill. C. R. R. Co. v. Swearingen, 33 Ill. 293, and St. V. & T. H. R. R. Co. v. Washburn, 97 Ill. 253.

In the former it was held that although the land owner built the fence as the employe of, and with materials furnished by the company, he did not thereby assume the duty of thereafter maintaining it. In the latter there was a contract between the company and the land owner by which he undertook to maintain the fence for a time which had not elapsed when the accident occurred. These cases do not support the contention of appellant.

It is suggested the company is not responsible unless it had reasonable time to repair the breach before the injury occurred, citing Ill. C. R. R. Co. v. Swearingen, 47 Ill. 206. When a company uses ordinary diligence to maintain a fence, and a casual breach occurs without its fault, it should have a reasonable time within which to repair, as ruled in the case cited, and other cases since decided to the same

Wabash R. R. Co. v. Randol.

effect. Here, however, the fence was not in good repair and evidently had not been for some time. The section foreman, a witness introduced by defendant, says it was not in very good condition and so do other witnesses. Manifestly it was not; for the posts were so rotten that three panels went down at once. Due care on the part of the defendant's employes would have led them to strengthen it in time to prevent this accident.

The case of C., B. & Q. R. R. v. Seirer, 60 Ill. 295, cited in the brief, is hardly in point.

There the plaintiff had, of his own motion, repaired a breach in the railroad fence, but did it insufficiently, though it looked well enough. He knew it was not sufficient. The company knew nothing of this, and under the circumstances it was held he could not recover, because he had voluntarily assumed to make the repair without notice to the company of the breach, and knew he had not done it properly.

That case is unlike this. Here the plaintiff had not misled the company by assuming to repair and not doing it well. He had at most only neglected to see whether the fence was sufficient. As it was the duty of the company to make a fence there, and as it had adopted and appropriated this fence, it was bound to use due care to keep it good. He had the right to rely upon this and to act accordingly.

It is urged the court erred in permitting proof of the value of the fees of the plaintiff's attorney, because the declaration made no demand for an allowance on that account. Assuming it is necessary to so demand in the declaration, the objection must be overruled, because it comes too late. Such a point should be made specifically when the evidence is offered, so that, if well taken, it may be obviated by amendment. No other objections are urged and the judgment will be affirmed.

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Michael Stockbarger and Charles H. Stockbarger v. I. W. Sain.

1. **PARTIES—Who May Sue When Principal is Not Disclosed.**—When the principal is not disclosed, either principal or agent may sue upon a contract not under seal.

2. **APPELLATE COURT PRACTICE—When Errors Will be Deemed Waived.**—Where the abstract does not contain instructions complained of as error, and the objections to them are not pointed out in the briefs, the alleged errors will be deemed waived.

Assumpsit, for breach of a contract of sale. Appeal from the County Court of Cumberland County; the Hon. GESHAM MONOHON, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

L. N. BREWER and P. A. BRADY, attorneys for appellants.

SCRANTON & SCRANTON, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The action was assumpsit by appellee against appellants to recover damages for failure to comply with an agreement in writing, which is in words and figures following:

“Sold my entire crop of broom corn to I. W. Sain, for Day & Hubbard, Chicago, or Merkle, Paris, Ill., for sixty-five dollars (\$65.00) per ton, to be well baled, when dry, and smuttered corn to be rethreshed, and all soiled corn to be kept separate and baled separate. Think will have 14 tons green hurl, and possibly 20, and the balance damaged by smut and fired to be delivered when all baled and dry. Rec. on the same \$200.00 check. Crooked, half price.

M. STOCKBARGER.”

The more important alleged error discussed or specifically pointed out in the brief of appellant is, the verdict is contrary to the evidence; first, because it was against both appellants upon a contract entered into by but one of them;

Stockbarger v. Sain.

second, because it appears from the contract appellee was not one of the contracting parties, but only an agent; third, there was not sufficient proof of a breach of the agreement.

If the appellee entered into the contract as an agent his principal was not disclosed, and it does not clearly appear he did not intend to be bound.

He was therefore personally liable for its fulfillment. 1 Amer. & Eng. Ency. of Law, 402 and 406.

When the principal is not disclosed either principal or agent may sue upon a contract not under seal. Saladin v. Mitchell 45 Ill. 79.

Aside from this we think the proper construction of the contract is that appellee is principal therein.

The statement that the corn was for Day & Hubbard or for Merkle may be properly regarded as indicating he expected to dispose of the corn to one or the other of the parties named, either by absolute sale or under contract afterward to be made for such party.

The more serious question is whether both appellants are liable.

We find evidence in the record tending to show that though the name of but one appellant appeared to the contract both were jointly interested as owners of the broom corn intended to be disposed of by it, that both acted jointly in delivering so much of the corn as was delivered, and that the acts of both were in other respects indicative of a joint acceptance of the benefits of the contract, and also evidence which tended to show both acted together in secreting and refusing to deliver a portion of the broom corn.

Upon all these points the testimony was not free from serious conflict, but after carefully consulting the whole testimony we are constrained to accept the verdict of the jury as being the better guide for our action.

The contract in that view of the weight of the testimony was properly regarded as that of both appellees, entered into in the name of M. Stockbarger.

The breach consisted of refusal and failure to deliver the "entire crop."

VOL. 69.] C., C., C. & St. L. Ry. Co. v. Patterson.

As to that, as before remarked, in view of all the testimony, we ought to regard the jury as the better judges of the weight of testimony.

The sufficiency of the declaration was questioned by demurrer, the ground thereof being it appeared from the allegations plaintiff was merely an agent and that the right of action was in the principal.

The declaration alleges appellee entered into the contract as principal.

The contract is set out in the declaration *in hoc verba*, and the argument in favor of the position the demurrer was well taken rests upon the construction given it by counsel for appellant.

As we are unable to agree such construction is correct, it follows we do not think the court erred in overruling the demurrer.

The abstract does not contain the instructions, nor are the objections to them pointed out in the briefs, and are deemed waived. E. St. L. Electric R. R. v. Stout 43 Ill. App. 546.

The judgment is affirmed.

Cleveland, C., C. & St. L. Ry. Co. v. A. L. Patterson.

1. COMMON CARRIERS—*Limitations of Liability by Contract*.—A contract by a shipper, that he will at his own risk feed and water stock while in transit, is valid, and if it appears that a shipment was understood to have been made under such a contract, the fact that the contract was not signed until the transportation was nearly complete will not render the carrier liable for failure to water stock.

TRESPASS ON THE CASE, for failure of railroad company to water stock. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

H. M. STEELY, attorney for appellant.

LAWRENCE & LAWRENCE, attorneys for appellee.

C. C., C. & St. L. Ry. Co. v. Patterson.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for \$35 against appellant for damages caused, as alleged, by negligence in transporting a car load of hogs.

The hogs were shipped at Ridge Farm Station, on appellant's road, to be transported to Indianapolis. They were placed in a stock car about 5:30 p. m., and were immediately taken out by a train going north to Tilton, the terminus of that branch of appellant's road, a distance of some sixteen miles from Ridge Farm. Here the car was switched by the Wabash Railway Company to the "Y" connecting its road with the Peoria and Eastern Division of appellant's road, and was left there about eight o'clock p. m. The first freight train east on the P. & E. Division was due at 11:30 p. m., but that night it was two hours late, and reached Indianapolis about two hours behind time the next morning. There was some delay on the part of the Belt road in switching the car to the stock yards, and when it was unloaded five of the hogs were dead.

There is no complaint that the delays referred to caused the shipper to lose anything in the market price, for the hogs were promptly sold at the ruling figures for that day.

The only ground of recovery is that, for want of water, five of the hogs died.

According to the testimony, they had water just before being loaded in the car at Ridge Farm, and when placed on the "Y" at Danville they were apparently in good condition, but when taken into the train on the P. & E. Division they were hot and panting and two were dead.

They were then watered, and were watered again at Crawfordsville. Whatever negligence there was must have been in not sooner watering at Danville, and it is claimed that as the weather was unusually warm this was necessary. Had the train going east been on time they would have been watered two hours earlier than they were, and perhaps this might have prevented the loss.

There is evidence tending to show that they had been fighting while on the "Y," and this is the more probable,

VOL. 69.] C., C., C. & St. L. Ry. Co. v. Patterson.

because the seventy-one head in the car were made up of three or four different lots, and being strange to each other they would be likely to fight while the car was standing on the "Y," especially if they were uncomfortable from heat and thirst.

Assuming that the want of water while so waiting was the efficient cause of the loss, the question is whether appellant should be held responsible therefor.

Appellee was an experienced shipper of such stock; had frequently sent hogs by that train to the Indianapolis market and was familiar with the movement of trains. He also knew that in order to get the lowest rate the shipper was required to sign a certain shipping contract, which exempted the company from the consequence of neglect to feed and water stock during transit. He went away from the station the evening of shipment, without executing the contract, but returned the next morning without solicitation and signed it. At that time the car was still in transit, and he did not then know that anything unusual had occurred. It seems quite clear that both he and the station agent understood the shipment was upon the usual terms as to rates and conditions, and that the delay in signing the contracts was merely because the appellee did not go to the office for that purpose that evening. His action in going there the next morning shows plainly that he understood he was shipping under the contract and in consideration of the reduced rate.

It is not urged that he did not know the conditions of the contract, but merely that it is not effective, because not signed until the transportation was nearly complete.

We think if it was mutually understood that the contract was to be signed and that the shipment was to be thereunder, the mere delay in its execution until the service was partly rendered would make no difference, and therefore the case is to be considered in the same light as though it were actually signed the evening before when the hogs were placed in the car.

As stated, one of the conditions of the contract exempted the carrier from the duty to feed and water, the shipper

Hill v. City Electric Ry. Co.

assuming to do so at his own risk and expense, and being permitted to go with the stock on the same train without charge for the purpose of watering and caring for them. Had appellee done this he would have discovered the necessity for water while on the "Y," and would presumably have avoided the loss.

It does not appear that the appellant by its servants actually knew that the hogs were suffering for water, and any omission to discover the fact, or to water them, would be within the stated exemption. The contract also exempted the carrier from liability for injury caused by hogs crowding upon one another and the like.

If the contract is to be considered as applicable, it is difficult to see upon what line of reasoning the verdict can be supported. We are of opinion the motion for new trial should have been granted.

The judgment will be reversed and the cause remanded.

Edward W. Hill v. The City Electric Railway Company.

1. **SUBSCRIPTIONS — *Taking Security For, Does Not Release Subscriber.***—Persons desiring the extension of a street car line signed a subscription paper agreeing to pay certain specified sums on condition that the line be extended as desired. The company accepted the subscriptions, but required that they be guaranteed, which was done. The extension was then built. *Held*, that the guaranty was merely collateral, and did not release the subscriptions, which were subject only to the condition implied by law, that the extension be completed in a reasonable time.

Assumpsit, on a subscription. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1887.

LEFORGE & LEE, attorneys for appellant.

MILLS Bros., attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant signed a subscription by which he promised to pay the appellee one hundred dollars as a bonus for extending and operating its line of railway west on Pugh street, in Decatur, one-half mile in the direction of and near to property owned by appellant.

The subscription paper was signed by a number of other persons, who agreed to pay the amounts set opposite their names, respectively.

The company required that the payment of these subscriptions should be guaranteed, and accordingly a paper was signed by the appellant and sundry other persons agreeing to pay the company \$2,500, which was about the aggregate amount of these subscriptions, in case the road should be so extended by the first of the next January.

The extension was not made by that time, and this guaranty being no longer available, another to the same effect was signed by sundry persons, not including appellant, conditioned that the extension should be completed by the first of the next July. It was completed by the date last fixed.

Appellant insists that the making and accepting of these guaranties was in effect a release of the subscriptions and that as the conditions of the first guaranty to complete by January 1st was not complied with, and as he did not sign the second guaranty, he is not liable.

We think these guaranties were merely collateral and did not release the subscriptions, which were absolute and were subject only to the condition implied by law that the extension should be completed within a reasonable time. It is not insisted, nor could it be successfully, that there was such unreasonable delay as should have avoided the subscriptions. The company accepted the subscriptions, only requiring they should be guaranteed, and built the extension as desired by the subscribers.

Having obtained what they desired they ought to pay therefor as they promised.

The judgment will be affirmed.

LeForge v. Colby Bros. & Co.

Julia A. LeForge et al. v. Colby Bros. & Co.

1. **MECHANIC'S LIEN—*Extent of.***—The lien of a mechanic or material man is upon the whole property and affects the entire estate, legal and equitable, held by the parties.

2. **SAME—*Purpose of the Notice.***—The notices under sections one and seven of the mechanic's lien act are required in order to protect the contractor in reference to the time when the lien shall attach, and as to its enforcement against other creditors, incumbrancers and purchasers.

3. **SAME—*When Notices Are Not Required.***—As to the owner and as to creditors, incumbrancers and purchasers, notices are not required. So far as they are concerned, the contract and its performance create the lien in favor of the contractor, and the notice by the sub-contractor, under section 25, secures the lien in his favor to the same extent as that of the contractor.

Mechanic's Lien.—Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

LEFORGE & LEE, attorneys for appellant.

J. M. GRAY, attorney for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
The appellees, as sub-contractors, obtained a decree enforcing their lien for materials furnished the contractor of a building erected for Charles C. LeForge upon a lot of ground owned by Julia A. LeForge, who had contracted to sell the same to said Charles C. and consented to the erection of said building thereon.

The decree recited the finding of these facts: that the petitioners have served written notice upon the parties as required by the statute; the amount due them; and ordered that in default of payment within twenty days the premises should be sold by the master.

The first objection urged in the brief of appellants is that the decree does not specify what interest or estate in the

premises is to be sold. There is no limitation, and this is in effect an order for the sale of the entire property. The fee is held by Julia A., subject to the equitable or contract right of C. C. under his agreement to purchase, and he with her knowledge and consent built the house. No question is presented as to any right of Julia A. as an incumbrancer.

The lien of the mechanic and material man, whether contractor or sub-contractor, under such circumstances is upon the whole property and affects the entire estate legal and equitable held by the parties therein. Sec. 1, act revising the law in relation to liens—Session Laws 1895, page 226. This objection must be overruled.

It is next urged it was necessary that the petitioners should file notices with the circuit clerk pursuant to sections 1 and 7 of said act.

The notices there required are to secure and protect the contractor, in reference to the time when the lien shall attach, and as to its enforcement against other creditors, incumbrancers and purchasers.

As to the lot owner who builds, or knowingly permits another to build thereon, and as to the latter such notices are not required. So far as they are concerned the contract and its performance create the lien in favor of the contractor, and the notice by the sub-contractor, under section 25, secures the lien in his favor which is provided for by section 22, in the same manner, on the same property, and to the same extent as that of the contractor.

The limitation fixed by section 34 as to the time within which the sub-contractor must commence his suit was observed in this instance.

This objection must also be overruled.

It is objected, lastly, that the materials furnished were not of the kind and quality required, and as no allowance was made because of deficiency in that respect the decree is erroneous. The evidence is not harmonious upon this point, but on examination of it we find no good reason to interfere with the conclusion reached by the Circuit Court.

The decree appears to be in accordance with the merits, as disclosed by the proof, and we think it should be affirmed.

Wilson & Son v. Loeb.

J. A. Wilson & Son v. Himan Loeb.

1. PRINCIPAL AND AGENT—*Principal, To What Extent Bound.*—A principal will be bound to the extent of the authority a third person, acting with reasonable prudence, will be justified in believing, from the acts of the principal, that the agent possessed.

2. SAME—*Bona Fide Buyer, How Far Protected.*—A *bona fide* purchaser, who relies upon the apparent ownership of an agent, is to be protected as against the principal, who, by his own act, created the existence of the apparent condition of ownership.

Replevin.—Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

LEFORGE & LEE, attorneys for appellant.

J. M. GRAY, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Appellee authorized his agents, Cowgill and Swallow, to purchase old iron, etc., commonly called junk, for him.

They were not authorized to sell, but only to buy, but they held themselves out to appellants as being the owners of a quantity of junk so purchased as agents, and offered to sell to them.

They bought, and appellee replevied and recovered judgment. Hence this appeal.

Appellee was the owner of the junk, and as he had not authorized Cowgill and Swallow to sell it, no title passed to appellant by the purchase, according to the general rule. 21 Am. and Eng. Ency. of Law, 567, and note 1.

There are exceptions to this general rule, and one of them, which is that a principal will be bound to the extent of the authority a third person, acting with reasonable prudence, would be justified in believing, from the acts of the principal, the agent possessed, is supposed to be applicable to this case.

It is complained the court refused to give to the jury instructions asked by the appellants, stating the principle of this exception to the general doctrine.

We do not concede any of such refused instructions correctly stated the principle of the exceptions, but think, had they done so, they should have been refused on the ground there was no evidence upon which to base them.

Appellant's case and testimony was, they did not know Cowgill and Swallow were agents, but believed they were owners of the property and bought from them as owners.

This belief was inspired by the representations and conduct of Cowgill and Swallow and not by anything done by or chargeable to the appellee.

They were, however, not owners, but only agents, and there is an entire absence of proof tending to show the appellee had invested them with power to sell, or did anything tending to hold them out to the world as being possessed of such authority.

They were in possession, but mere possession and control is entirely consistent with the relation of principal and agent.

In such cases as this, the remedy of the buyer is against the vendors upon the implied breach of warranty of title. 21 Amer. and Eng. Ency. of Law, 568.

It has been held a buyer of personal property from a vendee, who obtained possession of the goods through the medium of a fraudulent sale, will be protected, and such cases are not at all in conflict with our ruling in the case at bar.

The vendor, in cases of fraudulent sales, delivers possession of the goods to the vendee, as being the owner, and invests him with full apparent ownership, and indeed, such a vendee is the owner until the vendor repudiates the transaction because of the fraud.

A *bona fide* buyer who relies upon such apparent ownership is to be protected as against the seller who, by his own act, created the existence of the apparent condition of ownership.

The judgment in the case at bar must be and is affirmed.

Metropolitan Life Ins. Co. v. Zeigler.

**Metropolitan Life Insurance Co. v. George W. Zeigler,
Adm'r, etc.**

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69	447
91	365
69	447
106	88
106	91

1. INSURANCE—*Statements in the Application as Warranties.*—Where the application for a policy of insurance is expressly declared to be a part of the policy, and such statements are warranted to be true, they will be held material whether they are so or not, and if shown to be false, there can be no recovery on the policy.

2. SAME—*Falsity of Statements in the Application, an Affirmative Defense.*—The fact that the statements in the application upon which a policy of insurance is issued are false, must be set up by a special plea and proved by the defendant.

3. SAME—*Proofs of Death—When Unnecessary.*—Where the policy provides that the proof of death shall be made in a particular manner, after the company has given notice that the loss will not be paid, it can not be heard to object that the proof of death was not made as required by the policy..

Assumpsit, on a policy of life insurance. Appeal from the County Court of Macon County; the Hon. Wm. L. HAMMER, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

CONKLING & GROUT, attorneys for appellant.

W. B. TYLER and LEFORGE & LEE, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
This was assumpsit upon a policy of life insurance.

The defendant plead the general issue; also a special plea, alleging that in her application for the policy the deceased stated that she never had any disease of the kidneys or the lungs; that said statement was false; that she had, prior to that time, been afflicted with such diseases and was then, and so continued to be until her death, and that such diseases contributed thereto. The plaintiff demurred generally to this plea, and the court sustained the demurrer. The policy was issued upon consideration of the answers and statements contained in the application, all of which were declared to

be warranties and made part of the contract, and it was also provided that if any of such statements were not true the policy should be void. We are unable to see upon what ground the plea was held bad.

In *Continental Ins. Co. v. Rogers*, 119 Ill. 474, it was held that where the application is expressly declared to be a part of the policy, and the statements therein are warranted to be true, such statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the policy.

It is said, however, that as the general issue was filed, this plea was superfluous and therefore the demurrer was properly sustained. Such an objection can not be made by general demurrer, but it must be specially pointed out. It was held in the case just cited that it is not necessary for the plaintiff to allege or prove such matters as appear in the application, and that to be availed of as a defense, their falsity or breach by the assured must be set up and proved by the defendant. Hence it would seem that a special plea is not only proper, but necessary, and such was the intimation of the court in the subsequent case of *the Phoenix Ins. Co. v. Stocks*, 149 Ill. 319. But if, as urged by appellee, the proof might have been offered under the general issue, the defendant was not bound to offer it after the special plea had been held bad. As was said in *Hamlin v. Reynolds*, 22 Ill. 207: "The question had once been presented to and decided by the court, and without some intimation of a change of opinion by the court the appellant would be justified in supposing the court would adhere to the decision already made."

It is objected that no proper proofs of loss were made ten days before the suit was brought, as required by the policy.

It appears that the assistant superintendent of the defendant for the locality was notified of the death the same day it occurred, by the plaintiff, who had not then been appointed administrator, and that after some investigation and conference with the superintendent and by direction

Young v. Paris.

of the latter, he notified the plaintiff the loss would not be paid. The policy provides that proof shall be made upon blanks to be furnished by the company. No such blanks were furnished, and in view of the action of the superintendent, it was not necessary for the plaintiff, after he was appointed administrator, to again give notice of the death, to the end that blanks might then be furnished. On the evidence as it here appears, we are inclined to hold the company can not be heard to object that the proof of death was not made as required by the policy. For the error in sustaining a demurrer to the special plea, the judgment must be reversed and the cause remanded.

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A. M. Young v. William Paris.

1. **SALES—Provisions to Take Possession in Case of Non-payment—Revocation.**—A provision of a contract for the sale of a sewing machine, that in default of the stipulated payment the seller is authorized to resume possession of the machine, can not be revoked any more than any other provision of the contract. Under such a contract, the purchaser is bound to surrender the machine if he does not pay according to the contract, and failing to do so, the seller has the right of possession.

2. **VERDICTS—Upon Immaterial Issues.**—An immaterial issue presented by a replication is not aided by a verdict, and judgment may be rendered for the defendant *non obstante veredicto*.

Trover.—Error to the County Court of Moultrie County; the Hon. ISAAC HUDSON, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

Copy of the contract in suit as it appeared in the abstract:

THE SINGER MANUFACTURING CO. LEASE.

This certifies that I, Wm. Paris, now residing at No. . . . in the town of Sullivan, State of Ills., have received of the Singer Manufacturing Company (whose corporate existence and capacity for all purposes is hereby admitted), one Singer Sewing Machine, style VS 5dr B. W. and No. 10220164, with apparatus belonging thereto, all in good order and valued at \$60, which I am to use with care and keep in like good order, and for the use of which I agree to pay, as follows, viz: Cash \$5. C. N.

\$5 on the delivery of this agreement, the receipt whereof is hereby acknowledged and accepted as payment for the rent for the first month only, and then, at the hereafter mentioned date, the several amounts which shall be for rent only to said date respectively.

The sum of three.....on the 10th day of each month.

The sum of.....dollars....on the....day of.....

The sum of.....dollars....on the....day of.....

The sum of.....dollars....on the....day of.....

The sum of.....dollars....on the....day until paid for.

The sum of.....dollars....on the....day of.....

But if default shall be made in either of said payments or if I shall sell or offer to sell, remove or attempt to remove, the said machine from the aforesaid residence, without the written consent of said, The Singer Manufacturing Company, then and in that case, I agree to return the same, and that it or its agent may resume actual possession thereof; and I hereby authorize and empower the said Singer Manufacturing Company, or its agent, to enter the premises wherever said machine may be and take and carry the same away, hereby waiving any action for trespass or damages therefor and disclaiming any right of resistance thereto.

It is also further agreed, that I may at any time within said rental term purchase the said machine and apparatus by paying the above valuation therefor; and then and in that case only the rent therefor paid shall be deducted therefrom.

Witness my hand and seal this 10th day of Sept., 1892.

W.M. PARIS, [SEAL.]

NORIE PARIS. [SEAL.]

JOHN R. & WALTER EDEN, attorneys for plaintiff in error.

R. M. PEADRO, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
This was trover to recover the value of a sewing machine. Defendant pleaded that he took the machine pursuant to the terms of a written agreement for the sale thereof, whereby, upon default of stipulated payments, he was authorized to resume possession of the property. The plaintiff replied that he revoked the license contained in said agreement under which the defendant took the machine.

Issue was taken on the replication, and a trial by the court without a jury resulted in a finding for the plaintiff.

Assuming the evidence was sufficient to show a "revoca-

Turk v. Elliott.

tion of the license" by the plaintiff, the question is as to its legal effect.

The plaintiff had no more power to revoke that provision of the agreement than any other. He was bound to surrender the machine if he did not pay according to the contract, and failing to do so, the defendant had the right to possession. Legally speaking, there could be no such revocation.

The issue presented by the replication was immaterial.

Such an issue is not aided by a verdict, and had it been found for the plaintiff by a jury, the judgment should have been for defendant *non obstante veredicto*. Tidd's Practice, Sec. 721-2.

The judgment must be reversed and the cause remanded.

Abram S. Turk v. Edwin R. Elliott.

1. **FORCIBLE DETAINER—*Informalities in the Proof on Appeal.***—In a forcible detainer suit both parties proceeded to trial as though it was a conceded fact that the defendant occupied the room described in the complaint, and the defendant claimed the right to continue to occupy the room. The evidence identified the premises in controversy as a room in a building in the city of L., owned by the plaintiff and occupied by the defendant, and it appeared that written notice to surrender it, by the description given in the complaint, was served on the defendant. *Held*, that an objection that more formal and precise description was not made on the trial could not be raised for the first time on appeal.

Forcible Detainer.—Appeal from the County Court of Montgomery County; the Hon. GEO. R. COOPER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

ZINK & KINDER, attorneys for appellant.

PAUL McWILLIAMS and CREIGHTON & GARDNER, attorneys for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The plaintiff below was Adeline Elliott, and she recovered

judgment in forcible detainer against the appellant upon a complaint, the allegation whereof is, that appellant "unlawfully withholds from her the possession of certain premises in said county, described as follows, to-wit:

"The first floor, now occupied as a clothing store, in the building on the northeast corner of lot one, in block twenty-one, of the original plat of the town, now city, of Litchfield."

Appellees are the legal heirs of said Adeline Elliott, she having departed this life.

The real contention between the parties, as clearly appears from the testimony, and the propositions presented by appellant to be held by the court as the law of the case, was whether, under the contracts and agreement between the parties, appellant, who had occupied the store room for a number of years as tenant of the plaintiff, was entitled to continue in such possession as her tenant or was bound to surrender to her on the first of May, 1896, as she had demanded in writing he should do.

Appellant had occupied the building without a written lease, and, so far as we can determine from the evidence, without any definite agreement as to the period of time of occupancy. He paid rent monthly. There was not a little testimony to the effect he regarded his tenancy as not for any fixed period, and sufficient other testimony to warrant the conclusion it was understood between the parties his holding was by the month only. Demand for possession was given in writing upon the theory his tenancy was by the month. We can not say the court erred in finding he was a tenant by the month, and that his holding was unlawful when the complaint was filed.

It is urged as a further ground of reversal, first, that it was not proven the appellant was in possession of any room on the day the suit was instituted; second, that it was not proven the appellant was at any time in possession of the room described in the complaint and judgment.

It sufficiently appeared from the testimony the appellant, as tenant of the plaintiff, occupied a business room in Litchfield when the notice to surrender possession was served,

Yanaway v. Strockbine.

and for some years before that, and that he was still occupying the room at the time of the hearing; therefore, the first of said alleged grounds of error is not tenable. It is true, as urged on the second ground for reversal, the room in question was not identified by the full description contained in the complaint.

The evidence was directed to the real controversy, which was whether the appellant held the premises, the possession whereof plaintiff sought to recover by the complaint, as a tenant by the month, and formal proof that the room in dispute was on the northeast corner of lot No. 1, etc., and as set forth in the complaint was not made.

But it is manifest both parties proceeded in the trial as though it was a conceded fact the appellant occupied the room described in the complaint as a clothing store, and upon his part the appellant claimed his right to so occupy the room had not expired when the action was commenced.

The evidence identified the premises in controversy as a room in a building in Litchfield, owned by the plaintiff, and occupied by the appellant as a clothing store, and it clearly appeared written notice to surrender the same room by the same description as given in the complaint was served upon the appellant.

That more formal and precise description had not been made was not specifically raised in the trial court, and it would, under the circumstances of the case, be manifestly unjust to allow it to be raised for the first time in this court. The judgment is affirmed.

Jane Yanaway v. Mary E. Strockbine et al.

1. **ANTE-NUPITAL AGREEMENTS**--*Existence of, etc.*—The court discusses the evidence and finds that no ante-nuptial agreement existed between appellant and her deceased husband.

Creditor's Bill.—Appeal from the Circuit Court of Clark County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

GRAHAM & TIBBS, attorneys for appellant.

ROBERT E. HAMILL, attorney for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery by the appellees as creditors of Israel Yanaway, deceased, to subject certain real estate to the payment of his debts. There was a decree according to the prayer of the bill from which the defendant appealed. The appellant is the widow of said Israel Yanaway, whom she married some two or three years before his death, he being at the time of the marriage nearly eighty-three years of age. She claims that the property in question was bought after their marriage, with certain promissory notes which he had given her before marriage and in consideration thereof.

He had given the bulk of his property to his children by a former wife—who died only a short time (a few months) before he married appellant—retaining a small quantity of land, and a number of promissory notes, the exact amount of which is uncertain, ranging somewhere from six to ten thousand dollars.

Soon after his first wife died he became dissatisfied with his condition, wanted a home of his own, and it is claimed, as an inducement to the appellant to marry him, proposed to give her all the property he had left.

She wanted to see the notes, and as is shown, he brought a package of notes on sundry persons, the aggregate amount being unknown to the witnesses, and placed them in her hands. She gave them back to him for safe keeping as she claims. Shortly after, they were married, and a few months later the real estate in question was purchased and occupied by them as a residence until his death. She still occupies it as her homestead. The deed was made to "Israel Yanaway and Jane Yanaway, his wife, and after their death to Jane Yanaway's heirs." The price paid for the property was \$1,500, of which \$100 was paid in cash and the balance in promissory notes held by him, and which he in-

Yanaway v. Strockbine.

dorsed to the vendor. For some years he had kept his notes in a package or box at a bank and was in the habit of going there from time to time as he had occasion. He continued in this way after his marriage to appellant until a short time before his death, when he went to the bank with her and indorsed all the notes remaining, to her and the package was left there, subject to her order. Just before his death he made his will, by which he gave her all his estate real and personal, which will was duly probated. We shall not undertake to state the evidence, as it is quite voluminous, but merely the conclusion we have reached.

We are impressed with the view that there was no ante-nuptial agreement based upon the consideration of marriage and subsequently carried out, by which she became the owner of the notes given for the purchase of the property in question. There is no pretense that there was an agreement in writing as required by the statute of frauds, but merely a verbal agreement afterward executed.

Conceding, without discussing or deciding, that such a verbal agreement may be executed after marriage, to the detriment of subsequent creditors, and upheld, we think the evidence fails to establish the position taken in that behalf by appellant.

Mr. Yanaway seemed to have the intention merely of making his last wife the sole heir of what he retained after the division he had made with his children. In various forms of expression, at various times and to various persons before and after this marriage, he stated that what he had was for his personal benefit, to provide him with a home and all the comfort and attention his condition required and what was left should go to his wife, who was expected to care for him and see that he had such comfort and attention.

It does not appear that he proposed to give her his property in consideration of marriage merely, and there was no thought of an ante-nuptial, provision in the strict or legal sense of the term.

He retained the control until very near the last, of his notes, never conveyed her his real estate, and as though to

effectuate a consistent purpose ent-
ning, he finally made his will, by wthm the begin-
remained, both real and personal. e her what

Taking isolated expressions as reported ^{of} of the
witnesses, we might easily reach the conclusion by
appellant that there was a verbal ante-nuptial agree-
consideration of marriage subsequently executed, bu-
sidering the whole evidence, in the light of his action
well as hers, we are led to the conclusion stated. Adopting
this view, the property in dispute is to be treated as though
conveyed to him in fee. The decree was so predicated and
we think it should be affirmed.

**Kingman & Company and P. T. Baker v. C. W. C. Hill,
Jr., Allie Hill, O. M. Mauk, and A. C. Jamieson.**

1. **HUSBAND AND WIFE—*May Give Preference to Each Other in Paying Debts.***—While more or less suspicion will naturally attach to trans-
actions by which a debtor protects his wife in preference to his other
creditors, yet if the claim is *bona fide* and if the wife has done nothing
to estop her, she may insist upon and maintain her right to such a pref-
erence.

Creditor's Bill.—Appeal from the Circuit Court of Clark County;
the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this
court at the November term, 1896. Affirmed. Opinion filed February
25, 1897.

ROBERT E. HAMILL, attorney for appellants.

GRAHAM & TIBBS, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery to set aside a conveyance of
real estate so that the property might be subject to sale on
execution in favor of the complainant against the grantor.

It was charged that the conveyance was fraudulent be-

Kingman & Co. v. Hill.

cause without consideration, and because intended by the parties to hinder and delay complainant in the collection of his demand.

Answers were filed denying the alleged want of consideration and averring that the transaction was free from fraud. The cause was heard upon pleadings and proofs, and a decree was entered dismissing the bill. It is urged this decree is contrary to the evidence.

A statement of the details of the controversy and of the evidence need not be made. As we regard it, the only important point in dispute is whether the sum of \$2,500, which the grantee agreed to pay to the wife of the grantor, can be reached and subjected to the claims of the grantor's creditors.

Shortly stated, the grantor received at different times different sums of money from his wife's father which he invested in his business. For a part of this money he gave his notes, and for the residue there was only an open account.

These transactions ran along for a number of years without adjustment, though the fact of indebtedness was not questioned. Finally, the father-in-law died, leaving a will, by which he gave her these demands against her husband, which, with interest, aggregated \$2,500 or more. This will was probated only a few months before the making of the deed in question.

If the evidence of the parties is to be believed, the wife had a *bona fide* demand against her husband for the sum which the grantee undertook to pay her.

It was a question of good faith and credibility which the chancellor was to determine, and in doing so, he enjoyed the advantage of having the parties all before him. He must have felt satisfied that their version of the matter was true and genuine. While more or less suspicion will naturally attach to such a transaction whereby a debtor protects his wife in preference to his other creditors, yet if the claim is *bona fide* and if the wife has done nothing to estop her, she may insist upon and maintain her right to the preference. After a careful reading of the case as presented by the abstract, we find no occasion to interfere with the decree and it will therefore be affirmed.

APPELLATE COURTS OF ILLINOIS.

69.]

D. P. Erwin & Co. v. Holloway.

D. P. Erwin & Co. v. John T. Holloway.

MASTER AND SERVANT—*False Representations by Servant.*—A master may discharge a servant for false representations as to his capacity.

SAME—*Evidence as to Truth of Representations by Servant.*—Where it appears that a person seeking employment made representations as to the amount of work done for a former employer, and his reasons for leaving such employer, and that such representations had little weight in securing his engagement, the new employer should be advised to develop the whole truth on both of these points in a suit for wrongful discharge.

tachment.—Transcript from a justice of the peace. Appeal from Circuit Court of McLean County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

STATEMENT OF THE CASE.

The appellant firm are wholesale dry goods merchants. Appellee represented them as a traveling salesman. He agreed his employment was for the term of one year, at a fixed salary of \$15 per week.

He claimed his compensation was based on commissions on sales of goods made by him and his engagement for no definite time.

He represented the appellants about twenty days; visited a number of towns and small cities; received \$75 to begin defraying his expenses; reported but one sale, and that to the amount of but \$12, and was discharged.

He recovered judgment upon his theory of the contract and they appealed.

Prior to his engagement with the appellants, appellee was in the employ of Mr. C. W. Klemm as a traveling salesman.

In answer to his letter asking a position with the appellant company they requested him to state the amount of his compensation for Mr. Klemm, and to give the reason why he left that position.

D. P. Erwin & Co. v. Holloway.

He replied that his sales for Mr. Klemm would probably be \$35,000 in a year, and that he left Mr. Klemm because he thought he could "better himself financially and otherwise."

It appeared from the testimony he traveled for Klemm about two months only, during which time he made sales to the amount of \$2,714 and was withdrawn as a salesman at the end of that period.

Mr. Klemm testified, "We parted on a mutual understanding. I said perhaps we had best part and he thought so too," but the court refused to allow the witness to give the conversation between himself and appellee or to state the reason that induced him to dispense with the services of the appellee.

The court, on behalf of appellee gave the following instruction:

The court instructs the jury that if they believe, from the evidence, that the defendant was hired for a fixed salary for a definite time, and was discharged wrongfully before the end of the time of his service, then you should find for the plaintiff, and assess his damages at such sum as you may believe, from the evidence, he has incurred on account of such wrongful discharge, not to exceed the amount of wages that the plaintiff, under his contract, if any, would have earned up to the time of bringing the suit.

KERRICK, SPENCER & BRACKEN, attorneys for appellants.

WELTY & STERLING, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

It is undeniable the representations made by the appellee as to the amount of the sales made by him prior to his engagement with the appellant company, and as to the reasons or causes which operated to sever his relations with Klemm, had great weight to induce the appellant company to take appellee into their service, and this whether the agreement entitled appellee to a fixed salary or compensa-

VOL. 69.]D. P. Erwin & Co. v. Holloway.

tion by way of commissions. A master may discharge a servant for false representations as to his capacity.

It was important, therefore, that the appellant company should have been permitted to develop the whole truth upon both of these points, and that instructions to the jury should have been accurate and comprehensive in respect to both of them.

But the court refused to permit the appellant company to show by Klemm the facts as to the severance of appellee's relations with him, and restricted the testimony of the witness to the statement that "they parted on a mutual understanding, and because both thought it best they should part."

The conversation between Klemm and the appellee, not the conclusion of the witness thereon, should have been admitted to the jury.

In addition, the instruction given the jury in behalf of the appellee, which is set out in full in the statement, is so framed as to practically exclude from consideration the question whether the contract was induced by the misrepresentations of the appellee as to his capacity as a salesman and as to the reasons he did not retain his former position as a salesman for Klemm.

It was readily susceptible of the interpretation that if a contract was entered into, the appellee was entitled to recover, unless causes arising afterward warranted his discharge.

Instructions given on the part of the appellants had some tendency to remove this objection, but, all considered together, there yet remained room for misapprehension.

Moreover, we strongly incline to the view, a finding the compensation agreed upon was by way of commissions would have been more in harmony with the weight of the evidence and the justice of the matter.

Upon the whole record, we think the judgment should be reversed and the cause remanded for another hearing.

Baker v. Baker.

Elliott Baker v. Nettie Baker.69 461
210s 534

1. **REMEDIES—Whether at Law or in Equity—When Too Late to Raise the Question.**—The objection that there was a complete remedy at law, and consequently no jurisdiction in equity, can not be raised for the first time in the Appellate Court.

2. **EXEMPTIONS—Desertion of the Husband—Subsequent Incumbrances.**—By the act of desertion the husband transfers to his family the right to the exemption out of his property which the statute confers upon him while residing with them, and he can not after or as a part of such desertion incumber his property, to the detriment of his family, in favor of one knowing the facts.

Bill for Divorce.—Appeal from the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

MUMFORD & JOHNSTON, attorneys for appellant.

WILLIAMS & WILLIAMS, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This was a bill in chancery filed by Nettie Baker against Sherman Baker, her husband, for separate maintenance, making Elliott Baker a co-defendant. It was alleged that said Sherman had deserted the complainant without just cause, and that he had executed to said Elliott Baker, his father, a chattel mortgage upon all the personal property owned by him, consisting of horses, hogs, cattle, farming implements, corn and hay, and upon a horse, buggy and harness and some hogs in which she was a part owner; that the object of said mortgage was to deprive her of the means of supporting herself and their children, and prayed for an injunction to restrain said Elliott from selling the property. Such an injunction was awarded, and afterward the bill was amended, praying for a divorce on the ground of adultery, drunkenness and other misconduct, reiterating the charge of desertion and insisting that by virtue of the statute of exemptions in such case made and provided, she became en-

VOL. 69.]Baker v. Baker.

titled to the said chattel property of said Sherman, and that the mortgage to said Elliott was void for that reason, it being averred that he well knew when he took it that said Sherman had so abandoned the complainant, and that he assisted him with money and otherwise in so doing. She also averred that she was entitled in her own right, as owner, to an undivided part of the said property, as alleged in the original bill, prayed for an accounting in respect thereto and for an award of so much of the property as might be deemed right and proper for the maintenance of herself and of their children. The injunction was so modified as to permit the said Elliott Baker to sell the property and bring the proceeds into court, subject to such order as the court might finally make in respect thereto. Sherman Baker failed to answer. Elliott demurred to the bill and his demurrer being overruled, answered. On a final hearing, a decree was rendered for divorce, giving complainant the custody of the children and requiring Elliott Baker to pay her \$300 on account of the property so disposed of by him in which she claimed the rights and interest as alleged in the amended bill. From this decree against him said Elliott has prosecuted this appeal.

It is now urged on behalf of appellant that, so far as the property is concerned, there was an adequate and complete remedy at law.

It does not appear from the abstract that such objection was presented in the Circuit Court. The bill averred joint ownership as to a part of the property by complainant and her husband, and that by reason of the abandonment, she was entitled to claim out of his property the amount allowed him by law for his exemptions for the family support; that the said Elliott knew when he took the mortgage that her husband had deserted her, and that he fraudulently assisted him therein. We do not feel called upon to determine whether the bill presented a case where a court of equity has exclusive jurisdiction, so far as the property was concerned. The case against the husband and that against his father were so closely connected that it was a most con-

Baker v. Baker.

venient and appropriate method to bring in the latter with reference to the alleged unlawful appropriation of the property of the former, out of which she was entitled to an allowance for separate support, or alimony, and for the protection of her special interest, on account of her joint ownership, as well as in respect to the exemption.

Were the question necessarily to be determined, we should hesitate to hold that there was a complete and adequate remedy at law, and that therefore, under the circumstances, equity had no jurisdiction.

Recurring to the merits of the case as disclosed by the evidence, we find much to support the claim of complainant to a joint interest in the property described in the bill.

Aside from this, however, is the question of the construction of Sec. 15, Ch. 52, R. S., relating to Exemptions, which provides: "When the head of a family shall die, desert or not reside with the same, the family shall be entitled to and receive all the benefits and privileges which are, by this act, conferred upon the head of a family residing with the same."

By the act of desertion the husband transfers to his family the right to the exemption out of his property which the statute confers upon him while residing with them. To make this provision effective it is necessary to hold that he can not after, or as a part of such desertion, incumber his property in favor of one knowing the facts, to the detriment of his family. We are disposed to accept the suggestion of counsel for appellee that, waiving all other questions, the chattel mortgage to Elliott Baker was subject to this right of exemption in behalf of the deserted family of Sherman Baker. This family consisted of the wife and three small children, one of them born since the desertion. The custody of the children was, by the decree of divorce, given to the wife, and the burden of their support devolves upon her, he being insolvent as well as recreant to his obligations in that respect. By way of alimony she was entitled to an allowance out of her husband's property, and as she stood for and represented the family in its deserted condition, it

VOL. 69.] Board of Supervisors v. Comm'rs of Highways.

was but right to award to her the amount of exemption provided by the statute. It is immaterial upon what ground the relief granted by the decree may be predicated. She has been allowed no more than, by the proof, she ought to have, if, indeed, as much. The decree will be affirmed.

Board of Supervisors v. The Commissioners of Highways.

1. ROADS AND BRIDGES—*County Aid*.—The purpose of section 19, chapter 121, R. S., entitled "Roads and Bridges," is to require the county to aid a township in building bridges only where the expense of building a particular bridge is so great as to impose an unreasonable burden of taxation upon the town.

2. SAME—*Rule for Determining When the Cost of a Bridge is Too Great, etc.*.—The statute (section 19, chapter 121, R. S.) has supplied the rule for determining whether the cost of any proposed bridge should be deemed so great as to make it proper to exempt a town from a portion of the expense of constructing it, and that is when the cost of the bridge will be more than twenty cents on the one hundred dollars of the total assessment roll.

3. SAME—*One Petition Asking Aid in Building Several Bridges*.—The inclusion of a number of bridges in a petition for aid does not fix the liability of the county to aid in building all of such bridges if the total cost of all of them will exceed the sum produced by an assessment of twenty cents upon the \$100 of taxable property.

4. MANDAMUS—*Requisites of the Petition for County Aid in Building Bridges*.—A prerequisite to a demand for aid from a county is that a bridge is required, the cost of which will exceed the sum which would be produced by a levy of twenty cents on the one hundred dollars of taxable property of the town, appearing on the latest assessment.

Mandamus.—Appeal from Circuit Court of Vermilion County, Illinois; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

STATEMENT OF THE CASE. .

Appellees, Commissioners of Highways of the town of Oakwood, in Vermilion county, petitioned the Board of Supervisors of the county, for an appropriation under the

Board of Supervisors v. Comm'r's of Highways.

provisions of Sec. 19, Chap. 121, R. S., entitled Roads and Bridges, to aid in building ten bridges in the township.

The cost of completing the bridges, as estimated by the commissioners and shown in the petition, was as follows: one \$200, three \$240 each, one \$250, one \$255, one \$260, two \$360 each, one \$760, and it was estimated the sum of \$400 would be required to defray the expenses of the commission contemplated to be created by the statute to take charge of the construction of the bridges, making a total of \$3,565.

The petition alleged the town had provided and appropriated the sum of \$1,800, being more than one-half the total cost of the bridges, and had levied of road and bridge taxes in the town the full amount of forty cents on each \$100 of taxable property for the two preceding years, and that the cost of building all of said bridges would exceed the amount of twenty cents on the \$100 of taxable property of the township, as shown by the latest assessment roll.

The Board of Supervisors denied the prayer of the petition and appellee filed a petition in the Circuit Court praying for a writ of mandamus, commanding the board to grant the relief asked of it.

The petition for mandamus set forth the petition to the board in *haec verba* and alleged the matters therein contained were true, etc.

A general demurrer was interposed by the board and overruled by the court. The board abided its demurrer.

Judgment, according to the prayer of the petition was entered and the board appealed.

S. G. WILSON, State's attorney, and G. T. BUCKINGHAM, W. J. CALHOUN and H. M. STEELY, attorneys for appellant.

E. R. E. KIMBROUGH and JAMES A. MEEKS, attorneys for appellees.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Omitting portions not material for consideration the section of the statute here involved is as follows:

VOL. 69.] Board of Supervisors v. Comm'rs of Highways.

"When it is necessary to construct or repair any bridge over a stream * * * in which work the town is wholly or in part responsible, and the cost of which will be more than twenty cents on the one hundred dollars on the latest assessment roll, and the levy of the road and bridge tax for two years last past in said town was in each year for the full amount of forty cents on each one hundred dollars allowed by law for the commissioners to raise, the major part of which is needed for the ordinary repair of roads and bridges, the commissioners may petition the county board for aid, and if the foregoing facts shall appear the county board shall appropriate from the county treasury a sum sufficient to meet one-half the expenses of the said bridge or other work, on condition the town asking aid shall furnish the other half of the required amount." Par. 19, Chap. 121, S. & C. Statutes, Vol. 3, p. 1089.

Its purpose and proper construction is, to our minds, not at all doubtful.

It is to require the county to aid only in exceptional cases where the expense of building a particular bridge is so great as to impose an unreasonable burden of taxation upon the property of the town.

In all other instances, the cost of building bridges is cast by the statute upon the town in which the bridges are to be located.

The statute has supplied the rule for determining whether the cost of any proposed bridge should be deemed so great as to make it proper to exempt the town from a portion of the expense of constructing it, and that is when the cost of the bridge "will be more than twenty cents on the \$100 on the latest assessment roll."

A prerequisite therefore to a demand for aid from a county is that a bridge is required, the cost whereof will exceed the sum which would be produced by a levy of twenty cents on the \$100 of taxable property of the town, appearing on the latest assessment roll.

It did not appear from the petition for a mandamus that the cost of any one of the bridges mentioned would exceed that sum.

Hazelrigg v. Pursley.

Therefore, it is our conclusion, the petition failed to show a right to demand action upon the part of the Board of Supervisors.

The inclusion of a number of bridges in a petition, and the insistence, it is sufficient to fix the liability of the county to aid in building all of such bridges if the total cost of all of them will exceed the sum produced by an assessment of twenty cents upon the \$100 of taxable property is, we conceive, based upon a misconception of the true intent and meaning of the statute.

The Circuit Court should, in our opinion, have sustained the demurrer to the petition for a writ of mandamus.

The judgment is reversed and the cause remanded.

Wm. N. Hazelrigg v. John Pursley.

1. *PRACTICE—Defenses to the Merits in Probate Matters May be Made for the First Time in the Circuit Court.*—Appeals from the County Court to the Circuit Court in probate matters carry up the entire case to be tried *de novo*, and all defenses, except those in abatement, which should be made at the first opportunity, may be interposed as well on the appeal as upon the original hearing in the County Court.

2. *GUARDIAN AND WARD—Practice as to Allowance of Final Report.*—As a general rule, a guardian's final account will not be allowed until the ward has had an opportunity to examine it, unless the guardianship terminates during infancy, when it may sometimes be allowed on notice to parties interested, a guardian *ad litem* being appointed for the ward.

3. *SAME—The Rule as to Use of the Ward's Money for His Support Stated.*—Section 19, Chapter 64, R. S., gives a guardian a limited power to use the income of his ward's property for the comfort, support and education of the ward, and the language employed excludes the idea that the principal can be so used without an order of the court.

4. *SAME—Duty of Guardian to Invest Funds and Make Reports—Method of Accounting in Case of Failure.*—It is the duty of a guardian to lend the money of his ward as the statute provides, and to make full and specific reports, showing the items, separately, of all expenditures, and having failed to pursue this course, he should not be permitted to take credit for more than the money would have produced, if loaned as the law required, nor more than he is able to show was actually expended in addition to the fair value of what he himself furnished, less the value of any services rendered by the ward.

VOL. 69.]Hazelrigg v. Pursley.

5. SAME—*Guardian Must Protect Rights of Ward.*—It is the duty of a guardian to ascertain and secure the right of his ward, and if for want of ordinary care in that behalf the ward suffers, the guardian should be held responsible.

Citation in Probate.—Appeal from the Circuit Court of Pike County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

J. M. RIGGS, attorney for appellant.

W. H. CROW and W. L. COLEY, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant cited the appellee to appear in the County Court and make settlement of his accounts as the guardian of appellant, who had then attained majority. The appellee appeared in response to the citation and submitted his account, whereupon the County Court found there was due from him to the appellant the sum of \$1,288.39, which he was ordered to pay within ten days, from which he prayed an appeal to the Circuit Court, where, upon hearing, he was found to be indebted to the appellant in the sum of \$350, and by the action of appellant the record is brought to this court.

The appellee assigns as cross-error that the Circuit Court refused to dismiss the proceedings for want of jurisdiction. This rests upon the proposition that previous to the issuance of the said citation, and before appellant came of age, the appellee presented his final report as guardian to the County Court, showing that the ward was indebted to him; that the County Court, of its own motion, struck out the charge of a balance against the ward, leaving the account even, and approving the report as so modified, discharged the guardian.

It is urged this was an adjudication and operated to bind the ward so that no subsequent investigation of the accounts could be made by that court. This objection was presented for the first time in the Circuit Court on a motion to dismiss for want of jurisdiction, and was overruled. In the brief

Hazelrigg v. Pursley.

of the appellant it is urged that the appellee waived this objection by appearing in the County Court and filing his report, and that the objection in the Circuit Court came too late.

It does not appear that the motion to dismiss was passed upon by the Circuit Court when made, but seems to have been reserved to the final hearing, when, as appears by the order then entered, the court found that said report and the order of the County Court approving the same should be set aside. If that order of the County Court was valid and effective, it was an adjudication which might be pleaded in bar of the subsequent citation, and the right to so plead it would not be waived by the omission to make such defense in the County Court.

By the appeal to the Circuit Court the whole case was carried up, and was to be tried *de novo*. Had this defense been pleadable in abatement merely, it should have been made at the first opportunity, but as it is a bar to the proceedings, if valid, it could be interposed as well on the appeal as upon the original hearing in the County Court.

The question therefore is, what legal significance is to be attached to those proceedings?

That report was presented on the 24th of October, 1893, showing the balance on hand at the date of the last report, which was February 23, 1884, some nine years before, \$713.09, and interest thereon to date, \$413.58, making a total of \$1,126.67. The credits asked were as follows:

1883.	10 month's board, washing, schooling, omitted from report.....	\$120 00
	Interest at 6 per cent.....	72 00
1884.	12 month's board, etc.....	144 00
	Interest at 6 per cent.....	77 76
1885.	12 month's board, etc.....	144 00
	Interest at 6 per cent.....	69 12
1886.	12 month's board, etc.....	144 00
	Interest at 6 per cent.....	60 48
1887.	12 month's board, etc.....	132 00
	Clothing for 5 years.....	100 00
	Interest at 6 per cent.....	83 52

VOL. 69.]

Hazelrigg v. Pursley.

1888.	Board and clothing, 6 months.....	72 00
1889.	Board and clothing, 6 months.....	72 00
	Interest on same at 6 per cent.....	38 98
	Costs of report.....	2 00

Total disbursements.....\$1,331 86

Showing a balance in favor of the guardian of ..\$ 205 19

As already stated, the County Court reduced the credits by changing the footing so as to balance the charges, approved the report in that condition and discharged the guardian. No vouchers or proofs accompanied the report nor was any evidence presented to support it. This report purported to be final. The ward was not represented and knew nothing of it. In form it was not in accordance with the statute, Sec. 16, Ch. 64, which requires that the expenditures shall be specifically set forth in separate items and with proper vouchers. It gave the court no foundation upon which to predicate any action. It should not have been received or considered. We are inclined to hold that the proceedings thereon can not be regarded as an adjudication binding upon the ward. Hence when he came of age, he might cite the guardian to make a final report, regardless of those proceedings. As a general rule, a guardian's final account will not be allowed until the ward has an opportunity to examine it, unless the guardianship terminates pending infancy, when it is sometimes allowed on notice to parties interested, a guardian *ad litem* being appointed for the ward. Wait's Ac. & Def., Vol. 3, 577; Am. & Eng. Ency., Vol. 9, 144. The proceeding being *ex parte* the judgment therein was only *prima facie* correct, and though not then excepted to or appealed from was open to subsequent correction or challenge. Bond v. Lockwood, 31 Ill. 212.

It appears from the evidence that in 1883 or 1884 the ward, being then about eleven years old, was taken into the family of the guardian and there remained until he was past nineteen. He was a strong and intelligent boy, was useful and willing, and was required to work according to his strength and ability about the farm of the guardian. The evidence very forcibly tends to show that his services were

Hazelrigg v. Pursley.

worth as much as his board and clothes and school supplies. No account of any of these items was ever kept by the guardian, and when he came to make his report of October, 1893, he merely made an estimate of them in a lump sum for each year up to and including 1889, and attempted to prove that the charges were reasonable.

Assuming they were, can he be permitted in this way to break in upon the principal of the ward's estate?

In *Davis v. Harkness*, 1 Gil. 173, it was said that at common law it was a general rule that the expenses of the ward shall be kept within the income or produce of his estate though a court of chancery or other proper court would in case of necessity order a portion of the principal to be so appropriated, always using great caution in that respect because of the manifest danger of injury to the ward under guise of his supposed wants, with incidental benefits to the guardian, and cited the statute then in force, which provided that the guardian should have power to superintend the nurture and education of the ward, and for that purpose might pay out such portion of the ward's money as the Court of Probate might from time to time direct, provided the income from the real estate, and next, the interest on money, should be first resorted to. The present statute provides that "the guardian shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, so far as the same may be necessary, to the comfort and suitable support and education of his ward." Sec. 19, Ch. 64. The power here given to use the income for the specified purposes is limited, and the language employed excludes the idea that the principal can be so used without authority of the court. Other sections provide for loaning the money and leasing the real estate of the ward.

It was the duty of the guardian to loan the money as the statute provided, and to make full and specific report, showing the items, separately, of all expenditures from time to time, as required by section 16. Had this been done annually the court would have been able to ascertain whether it was necessary to expend more than the income, and, in view of the evidence in this record, it is probable that upon a full

VOL. 69.]Palmer v. Frank.

hearing it would have been found that the income from interest and the ward's services would have equaled and perhaps exceeded all necessary outlays for nurture and education. Having failed to pursue this course the guardian should not be permitted now to take credit for more than what the money would have produced if loaned as the law required, nor more than he is able to show was actually expended in addition to the fair value of the board furnished by himself, less what the ward's services were reasonably worth. An accounting on this basis would give the ward the whole of the money reported as on hand at the date of the first report, February 23, 1884, and so much of the interest thereon as would not be consumed by the credits, to be ascertained as indicated.

It is claimed on behalf of appellant that had the guardian taken the proper steps he might have obtained an allowance on account of the statutory award from the estate of the ward's mother, and that there was a sum of money due him which should have been realized from the partition of his father's lands. As the case must be reversed we do not care to express any opinion upon these points for the reason that it is not very clear what were the facts in reference thereto. As to the award, it was the guardian's duty to carefully scrutinize the proceedings of the appraisers and of the administrator, to ascertain and secure whatever the law gave his ward, and if for the want of ordinary care in that behalf the ward has suffered the guardian should be held responsible. So of the proceeds of the partition sale; if by his neglect the ward has lost his portion, he ought to respond.

On another trial the facts as to these matters can be more fully presented and the court will make such order in respect thereto as may seem proper. The judgment will be reversed and the cause remanded.

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Frank M. Palmer v. Nathan Frank.

1. APPELLATE COURT PRACTICE—*Second Presentation of the Same Questions in the Same Case.*—This court need not restate, nor, according

Palmer v. Frank.

to well settled practice, re-examine or reconsider questions which were considered and decided on a former appeal of the same case.

2. STATUTE OF LIMITATIONS—*As a Defense on Appeal—What the Record Should Show.*—A person relying upon the statute of limitations as a defense must plead it, and on appeal the record must disclose that it was interposed in the court below, and this rule applies even though the pleadings in the trial court were oral.

Transcript, from a justice of the peace. Appeal from the Circuit Court of DeWitt County; the Hon. LYMAN LACEY, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1887.

MOORE, WARNER & LEMON, attorneys for appellant.

P. T. SWEENEY and E. J. SWEENEY, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

This case was here at a former term, and was then reversed because we were of opinion that the plaintiff, who was defeated in the Circuit Court, was entitled to recover. 65 Ill. App. 124.

A second trial upon substantially the same evidence as the first resulted in a judgment for the plaintiff, from which the defendant has prosecuted the present appeal. The brief of appellant reargues the questions formerly presented. We need not restate nor, according to well settled practice, should we re-examine or reconsider those questions. A point newly made is that the action is barred by the statute of limitations. This was not presented when the case was here before, though the record was the same as now. It seems quite apparent, from an examination of the proceedings of the Circuit Court, that no suggestion of such a defense was made there.

Had it been, perhaps, it might have been met or obviated, for it depends upon the matter of a few days only as to which an explanation or correction might have been readily made. The pleadings were oral, yet it is reasonably certain the defense was not made. We find no hint of it in the propositions of law submitted by defendant nor in anything said or done on either side.

In *Kennedy v. Stout*, 26 Ill. App. 133, it was considered significant that no reference to such a defense was found in the propositions of law. So it is here, and further, it is significant that when the case was before us on a former occasion, with the record in the same condition, and a judgment for defendant, it was not suggested that the judgment might rest upon that ground.

In *Wilson v. Van Winkle*, 2 Gil. 684, the plaintiffs in error sought to reverse a judgment because of the bar of the statute of limitations as to which the court said: "It is a sufficient answer to this position to remark that a party can not avail himself of a defense of this character without pleading it or specially insisting on it, and that the record in this case nowhere shows that the executors (plaintiffs in error) relied on such a defense in the Circuit Court. If they desired to set up such a defense they should have interposed it in the court below. It is too late to introduce it for the first time in this court." In that case, the pleadings were oral, but the Supreme Court held that it must in some way appear from the record that the defense was made below.

Here the record not only does not show, but, as we think, it is apparent the defense was not made below and that it is presented for the first time in this court.

We are of opinion the judgment should be affirmed.

Isaac H. Snyder v. The City of Mt. Pulaski et al.

1. **ORDINANCES—Special Privileges.**—If a city has the power to grant a special privilege, the ordinance granting the same must be substantially complied with, and any abuse of the privilege granted will justify the city in revoking the same.

Bill for an Injunction.—Appeal from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

Snyder v. City of Mt. Pulaski.

A. G. JONES and BLINN & HARRIS, attorneys for appellant.

F. L. TOMLINSON and BEACH & HODNETT, attorneys for appellees.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant filed a bill in chancery against the appellees, the city of Mt. Pulaski and certain of its officials, to restrain them from interfering with him in the use of a certain well, known as the old well, and another known as the new well, or with his pumps and appliances connected with said wells. A temporary injunction was granted as to the old well. The appellees answered the bill, and moved to dissolve the injunction. This motion was heard by the court and was sustained, and the bill was dismissed. An appeal was then granted, and the injunction was continued pending the appeal.

It appears that on the 24th of March, 1891, the municipal corporation of (the then village of) Mt. Pulaski passed an ordinance authorizing the appellant, his heirs and assigns to construct and maintain an electric light plant within said corporation for a term of twenty years, and permitting the use of the streets, alleys or other public grounds for poles and wires, under certain restrictions.

On the 23d of June, 1891, said municipal corporation passed an ordinance granting to said appellant, his heirs and assigns, the use of a certain well at the intersection of Green and Spring streets in said village, for a period of twenty years, upon condition that he should maintain and repair the well so that it should "not be dangerous to those living adjoining thereto, or to the traveling public."

On the 27th of October, 1891, said municipal corporation passed an ordinance which in substance repeated the grant contained in the first ordinance, and provided, further, that for a consideration named, the appellant should furnish to the village, for the period of five years, sixteen electric arc lamps of 2,000 candle power.

Soon after the passage of the first ordinance, the appellant acquired property upon which to erect his power house, and wishing to secure a supply of water for steam purposes, he asked for and obtained the passage of the second ordinance and later constructed his electric plant for the purpose of supplying light to the public. Still later he obtained the passage of the third ordinance, by which he was to furnish light to the municipality. He claims that the second ordinance, which granted him the privilege of using the well, was such a part of the whole transaction, as that without it, he would not have accepted the franchise nor would he have erected the plant. In other words his claim is that it was a part of the consideration upon which he acted, and was so understood by the corporate authorities, and was intended as an inducement to him to accept said franchise and build the works.

It does not appear from the face of the ordinances that they were inter-dependent; on the contrary, they seem to be not so.

The appellant testified in support of his theory; that is, that without the second ordinance he would not have gone ahead under the first, and that it was so understood by the president and trustees of the village, and that to induce him to accept and proceed under the franchise they passed the second ordinance.

The village authorities referred to contradicted him flatly on this point, and if it were competent to establish the alleged inter-dependence by parol proof, it can not be said that the preponderance on the point was with appellant.

It is highly probable that the second ordinance was considered by appellant as very beneficial to him and no doubt it was, for it saved him the expense of providing water by some other means, but it does not appear that it was anything more than a mere gratuity. Aside from what he now says as to what he would or would not have done without it, we have no reason to believe that he would have abandoned the project had he failed to get the well, but whether so or not, unless it was legally a constituent of an entire

Snyder v. City of Mt. Pulaski.

transaction in the sense of being a part of the consideration moving to him from the municipality, by which he was induced to build the works and furnish lights on the terms and conditions agreed on, the ordinance must be regarded as on its face it appears.

No argument is needed to show that the municipal officials could not give away any part of the municipal property. Hence it was competent to repeal said ordinance, as was done shortly before this suit was begun, if it was enacted without a sufficient consideration. And this leads to a further statement of some of the facts appearing in the record. At some period subsequent to the passage of the third ordinance, appellant, wishing more water than the well was then furnishing, sank another well in the street, a few feet distant from the first, and connected the two, thereby obtaining such an abundance that he was able to supply two railroad companies and sundry other concerns with all the water they required, and made contracts for that purpose upon quite remunerative terms. For a time the municipality obtained some from him, but afterward extended its water works by sinking new wells, and so obtained what it required for protection against fire and other purposes. This action of appellant in sinking the new well in the street was without authority, and was an unlawful use of municipal property. Whatever its reason was, the municipality, then incorporated as a city, notified him to cease the use of the new well and to fill it up, whereupon he proceeded to erect a derrick over the old well and to sink it deeper for the purpose of finding another vein of water, which he did. Then the city passed an ordinance repealing said second ordinance, and by force took possession of both wells and filled them up. Afterward the present bill was filed and the temporary injunction was obtained, and then appellant cleaned out the old well, removing all the obstructions also from the deepened part thereof, and continued to use it as so deepened, the injunction preventing any further interference with his operations in that behalf. It is claimed on his part that the action of the city was arbitrary and unnecessary, that it

VOL. 39.]Snyder v. City of Mt. Pulaski.

was in violation of his legal rights and was prompted by a malicious purpose to injure him.

The city claims that the original ordinance was invalid, because, in effect, a mere gift of property belonging to the public; that the action of appellant in deepening the well was in excess of the privilege granted by said ordinance, whether valid or not, and injuriously affected the supply of water upon which the city was dependent for protection against fire, street sprinkling and other purposes; that the continued presence of the well in the street hindered and prevented the proper use of the street for purposes of travel, and that for all these reasons, and not from any purpose to oppress or injure appellant, it was warranted in repealing the said second ordinance and in removing the appliances and machinery of the appellant from the street.

Regardless of the possible motives impelling the city to this action, if it had sufficient legal reason, it must be sustained. It is not claimed that there was any authority for sinking the second well, but it is urged on behalf of appellant that he had, under the ordinance, an indefeasable right to the old well, and that this implied and carried with it a right to sink deeper and reach lower veins of water. We can not agree to the latter proposition. If the ordinance could be held binding upon the city and irrevocable during the specified term, the act of appellant in deepening the well was in excess of his rights, and was an abuse of the alleged privilege.

The right given was to use the well as it was, not to change or alter it and use it as changed or altered.

Such change or alteration, if persisted in and if injurious to the city in a substantial way, would forfeit the privilege, and would warrant the city in reclaiming the well if it had no other cause for so doing. Appellant insists the well, as it was, no longer furnished the requisite amount of water, and that in order to obtain the needed supply he was compelled to deepen it, therefore he has the right to use it as so deepened. But he had no right to so change it even assuming the ordinance was binding upon the city, and if

New York Life Ins. Co. v. Easton.

he insists upon the well as changed, his position is so unreasonable that he can not invoke the aid of a court of equity.

Without further discussion, we are inclined to hold that upon any fair view of the case as made by the proof the injunction was properly dissolved, and therefore the decree will be affirmed.

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New York Life Insurance Co. v. Taylor Easton.

1. **REMEDY—In Favor of the Maker of a Note Assigned Before Maturity.**—When the maker of a promissory note has a defense to the same in the hands of the payee, but is prevented from making such defense by an assignment of the note before maturity, he may, if compelled to pay the same, introduce the same evidence in a suit against the payee to recover the amount paid on such note, that he might have introduced in a suit against him by the payee, had such note not been assigned.

2. **WRITTEN INSTRUMENTS—Parol Evidence—When Admissible to Vary, etc.**—Section 9, Chapter 98, R. S., entitled "Negotiable Instruments," not only gives the maker of a negotiable instrument the right to introduce parol evidence to vary or deny such instrument when sued on, but also operates to abrogate the general rule, that parol evidence is not admissible as against another instrument than the one sued on, if such other instrument relates to the consideration of the one sued on.

3. **INSURANCE—Acceptance of Policy.**—The effect of the acceptance of a policy of insurance is a question of law, but the question as to whether one was or was not accepted is one of fact.

4. **SAME—Circumstances Tending to Show an Acceptance of a Policy.**—The receipt and retention of a policy of insurance are circumstances tending to show an acceptance, and in the absence of explanation, would be received as establishing it.

Assumpsit, for money paid, etc. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

MORAN, KRAUS & MAYER and D. A. HOLMES, attorneys for appellant.

J. F. HUGHES, attorney for appellee.

MR. PRESIDING JUSTICE BOOGS DELIVERED THE OPINION OF THE COURT.

The action below was assumpsit, by appellee. The declaration contained the common counts.

The case which appellee contends was made by the proof was that he executed and delivered to the appellant company his two certain notes, in consideration of the agreement of the company to deliver to him its policies of insurance on his life so conditioned that if the premiums thereon were paid for ten years the policies should remain in force for twenty years, and at the end of that period the full amount of the policies should be paid, together with the "accumulations" for the said period of twenty years; that policies were afterward sent to him framed on an entirely different and less desirable plan of insurance; that he refused to accept them, but that the appellant company assigned his notes before their maturity to an innocent holder, and he was forced to and did pay such notes to said assignee.

The action was brought to recover the amount paid on the notes to the assignee thereof.

It appeared the policies were issued upon a written application signed by the appellee and were conditioned in accordance with the provisions of the application.

Appellee was permitted, over the objection of the company, to introduce proof of the conversation which occurred between himself and the soliciting agent of the company, immediately prior to and while the application was in course of preparation, but before he attached his signature to it.

If this evidence was competent, it quite sufficiently established the claim of appellee that the application and policies did not provide for insurance upon the plan verbally agreed upon, but for much less desirable indemnity.

The appellant company insists the evidence was incompetent; first, because of the elementary general rule parol evidence is inadmissible to contradict or vary a written instrument; second, it contends it appeared from the evidence the appellee accepted and retained the policies under

New York Life Ins. Co. v. Easton.

such circumstances as to amount to an acceptance of them, and thereby became in law estopped to assert anything inconsistent with the terms, conditions and limitations contained in them or in the application.

As to the first ground of objection, it is not, in our opinion, tenable.

In the case of *Baker v. Fawcett*, 69 Ill. App. 300, we held the enactment of Sec. 9 of Chap. 98, R. S., entitled Negotiable Instruments, not only gave to the maker of negotiable paper the right to introduce verbal evidence to vary or deny the writing sued on, *i. e.*, the note, but also, that it operated to abrogate the elementary general rule that parol testimony is not admissible as against another writing than the note, if such other written instrument related to the consideration of the note, was executed in the course of the same transaction as was the note, and under such circumstances as that the note and such instrument ought to be regarded as but part of one and the same transaction.

The efficacy of the enactment referred to in our opinion clearly demanded the abrogation of the rule to the extent indicated in the case cited *supra*, and we still adhere to that view.

The appellee in the case at bar was not, it is true, seeking to defend against the collection of a note upon the ground the consideration thereof had failed or was wanting.

The action of the company, in disposing of the notes he had given to one against whom the statute was not available, had deprived him of the defense to them which the statute guaranteed him as against it.

He could only pay the notes to the *bona fide* holders thereof and resort to an action against the company to recover the sum so paid if it was wrongfully exacted from him.

In such an action it seems indisputable he should be permitted to support his right of recovery by any evidence which would have been admissible to sustain his defense had the action on the notes been brought by the appellant company.

VOL. 69.]New York Life Ins. Co. v. Easton.

In actions by an assured to recover upon a policy, the written application and the policy may embody the contract, as was held in Schmidt v. P. M. & T. Ins. Co., 41 Ill. 295, for the reason in such cases the statute we have referred to has no application to change the fundamental rule of evidence upon which such cases rests.

It is complained the court refused to give as asked instructions No. 3 and No. 4 in behalf of the company.

Counsel for the company in support of this insistence say in their brief:

"By these instructions, if given, the jury would have been told that the application and the policy constituted the only contract between the parties."

If we are right in the view hereinbefore expressed, that verbal testimony was competent for consideration in determining the contract between the parties, it is manifest the reasons urged in support of the attack on the rulings of the court upon the instruction in question constitute a full and complete defense against such attack.

The fifth instruction in the same behalf announced the law to be the appellee "was" presumed to have read his application and have knowledge of the limitations there expressed, and is to be bound thereby, and the objection is the court so modified it as to permit the jury to consider whether the evidence overcome the presumption.

This complaint but presents in a different phase the contention that the contract must be determined from the written instruments, the application and the policy, and that verbal testimony could not be lawfully considered to vary or contradict the statements contained in either of those writings.

The complaint as to instruction No. 6 is, it was so modified by the court as to leave the question whether appellee accepted the policies to be determined by the jury as matter of fact.

The effect of an acceptance of the policies is matter of law, but whether they were accepted must be matter of fact.

Receipt and retention of a policy are circumstances tend-

New York Life Ins. Co. v. Easton.

ing to show acceptance, and in the absence of explanation would be received as establishing it.

In the case at bar the policies came to appellee through the mails and enclosed with them were receipts for them to be signed and returned. He examined them and found them not satisfactory, and did not sign the receipts but seasonably notified the agent of the company at whose solicitation he executed the applications. He testified the agent agreed to come at a time named and examine the policies, but did not do so. He soon afterwards met the agent, and advised him of his objections to the policies, and after some further conversation the agent named a day some two weeks later when he would examine the policies, but failed to keep the appointment. Appellee deposited the policies for safekeeping and in due time tendered a return of them to the company.

We need not further follow the testimony relative to the conferences between appellee and such agent. It is sufficient to say unqualified acceptance was not proven, and that the company had full notice of that fact, provided it is chargeable with the knowledge possessed by its soliciting agent.

The policy however contained the following stipulation:

“No agent has power, in behalf of company, to make or modify this, or any contract of insurance; to extend the time for paying any premium; to waive any forfeiture; or to bind the company by making any promises; or making or receiving any representation or information. These powers can be exercised only by the president, vice-president, second vice-president, actuary or secretary of the company, and will not be delegated.”

It is contended, notice to be effectual must, by force of this stipulation, have been given to some one of the officials of the company therein specified.

At least one infirmity in this position, and a fatal infirmity too, is that unless the appellee accepted the policy no part of it was binding upon him.

The receipt of the policies through the mails was but a tender of them to appellee for acceptance.

VOL. 69.]New York Life Ins. Co. v. Easton.

It cast upon him the duty of accepting them or of objecting and making his objections known to the company.

If the appellee did not accept the policy its provisions were not binding upon him and the mode and manner of making his objections known depended not upon the stipulations of the policy but on the rules of law.

Sec. 23 of an act of the General Assembly, in force July 1, 1869 (Par. 115, Starr & Curtis' Statutes, Vol. I, page 1346), is as follows:

"Whoever solicits insurance on behalf of any life company not chartered by and not established within this State, or transmits for any person other than himself an application for life insurance, or a policy of life insurance to or from such company, * * * shall be held to be the agent of such company, to all intents and purposes." Statutes, Ch. 73, Sec. 23.

The appellant company has its charter from the State of New York, and no reason is perceived why the statutory provision quoted above should not apply to it and to the case at bar.

Moreover, the objection to the policy related to a particular branch of the business of the company, *i. e.*, the application for insurance, for the transaction whereof the agent in question was its agent, which is a cogent reason calling for the application of the statute to the case.

In view of what has been said, it follows, we think, the court also properly refused to give as asked the seventh instruction, which was, in effect, it was incumbent upon appellee to notify one of the officers specified in the policy.

The eighth instruction asked the court to advise the jury the policies were complete contracts of insurance, and that had appellee died while they were in his possession the beneficiaries named therein could have recovered upon them.

If the policies had not been accepted, clearly the instruction did not correctly state the law.

The modifications made by the court were for that reason properly made.

We think there is no error in the record.

The judgment must be and is affirmed.

Gibson v. Safety Homestead and Loan Ass'n.

Sarah C. Gibson et al. v. The Safety Homestead and Loan Association.

In the matter of the Intervening Petition of John R. Challacombe v. John J. McLean, Receiver.

1. BUILDING ASSOCIATIONS—Paid up Stock—*Owners of, Not Entitled to Priority.*—While it is perhaps true that building associations have no power under the statute to issue paid up stock, yet if they offer such stock, and persons chose to invest in it, such persons will in case of the failure of the association be allowed only the same share of the assets as other stockholders, and will not be regarded as creditors of the association, and entitled to priority in payment as such.

Error, to the Circuit Court of Montgomery County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

HOWELL & JETT and JAMES M. TRUITT, attorneys for intervening petitioners, plaintiff's in error.

LANE & COOPER, attorneys for defendant in error.

MR. PRESIDING JUSTICE BOOGS DELIVERED THE OPINION OF THE COURT.

The Circuit Court of Montgomery County having before it the question of ordering distribution to be made of certain funds in the hands of John J. McLean, receiver of the Safety Homestead and Loan Association, entered a decree in substance as follows:

The court, finding from reports of John J. McLean, receiver, that there is sufficient money in the receiver's hands to pay a dividend of twenty-five per cent to shareholders, and still leave enough money in the receiver's hands to pay taxes and other expenses of administration of said estate, orders, adjudges and decrees that the receiver pay a dividend of twenty-five per cent to all shareholders of said association in the following manner:

First. Receiver is ordered to pay from any money in

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VOL. 69.] Gibson v. Safety Homestead and Loan Ass'n.

his hands as receiver a dividend of twenty-five per cent among all shareholders, irrespective of withdrawals or of paid up stock, as follows:

The principal sum upon which dividends shall be paid to holders of common stock shall be the total amount of monthly installments paid by the several shareholders of such stock, with six per cent interest on the several installments, computed according to the average time of monthly payments from date of payment to April 23, 1895. Second. The principal sum on which dividends shall be paid shareholders of paid up stock shall be the total amount paid by the several shareholders of such stock, with six per cent interest from date. Association failed to pay six per cent interest on said stock, to April 23, 1895. Third. Borrowing shareholders shall be credited with amount of dividends payable on their shares when they pay off their loan to said receiver, but the credit shall be as of the date when dividends are paid to non-borrowing shareholders. Fourth. Receiver shall only pay dividends to persons by stock books as owners of stock on which dividends are paid. Fifth. Dividends shall only be paid upon presentation of certificate of shares to receiver, at time dividends are paid, for indorsement or credit thereon of amount paid.

This is an appeal by certain stockholders who deemed themselves aggrieved.

We were called upon in the case of Chapman v. Young, receiver, 65 Ill. App. 131, to consider and determine all of the questions here involved save one.

We perceive no reason for departing from the doctrines announced in that case nor any making it necessary we should again restate them here.

The point present here, and which was not involved in the Chapman case, *supra*, arises out of the fact the association now before the court adopted a plan of issuing stock of exceptional character denominated "paid up stock."

The certificates issued to holders of such paid up stock, and from which its character will appear, were as follows:

"This is to certify that —— of —— is the owner of

Gibson v. Safety Homestead and Loan Ass'n.

shares of the — series, dated —, of the prepaid capital stock of the Safety Homestead and Loan Association of East St. Louis, Illinois, having therefor paid the sum of \$50.00 per share in advance, transferrable only on the books of the association in person or by attorney upon surrender of this certificate, and is entitled to the dividends, and is subject to the conditions printed on the back of this certificate and the constitution and by-laws of the association," and bearing indorsement as follows :

"The stock represented by this certificate is entitled to semi-annual dividend of three per cent on amount paid therefor, which will be deducted from profits earned on stock, balance being credited on stock represented by this certificate. When amount to credit of stock equals \$100 per share stock is matured, and holder may withdraw same by surrender of this certificate, properly indorsed, and receive \$100 per share therefor. Holder may surrender stock by giving thirty days' notice any time after one year, and receive full amount paid, and portion of profits equal to earned and unpaid dividend thereon. Board of directors reserve right to call in, cancel and pay off certificate any time by giving person to whom issued thirty days' notice by mail at post office last known, and by paying him withdrawal value. After expiration of such notice stock represented by this certificate will not be entitled to further dividends, whether presented for redemption or not."

Plaintiffs in error contend :

(1.) The decree should direct the payment of this "paid up" stock in full before paying anything to the holders of the common stock;

(2) Or at least the amount paid by the holders of such stock, in excess of the amount which would have been necessary to pay the monthly dues on common stock up to the date of the appointment of the receiver, should have been directed to be paid in full before, and dividend declared upon the remainder as upon common stock.

The view of counsel in support of these contentions is, the association was without power to issue paid up stock, and

VOL. 69.] Gibson v. Safety Homestead and Loan Ass'n.

that the holders of such stock should be regarded as creditors of the association, and consequently entitled to priority in payment as other creditors, or at least should be regarded as a special class of creditors entitled to payment in full after ordinary creditors were paid, and before any dividends should be allowed on the ordinary or common stock.

It is perhaps true the association lacked power, under our statutes, to issue "paid up" stock, but it offered such stock, and of their own choice appellants preferred to invest upon that plan.

It offered in their view superior inducements and promised better returns.

The adventure was not successful and it became the duty of the court of chancery to convert the assets into money, pay the creditors and make distribution among all those who had invested their money in the enterprise.

In the Chapman case, *supra*, we said:

"The funds of an insolvent association should be administered by the court between stockholders on principles of equity, and to the end all members should equally and mutually bear their just proportion of the losses sustained in the course of the life of the society."

It may be the scheme adopted and the issuance of paid up stock thereunder was unauthorized by the strict letter of the law, but the fact remained the holders of such stock and the other stockholders, upon a mutual understanding, contributed their money to create a general fund to be administered by the association for the purpose of securing gains and profits for all contributors.

In an equitable point of view all such contributors, whether their contributions were represented by stock of the one or the other character, are, as to each other, the owners of the fund subject to the right of creditors against it.

It would be highly inequitable to declare, after such an association had become insolvent, that certain of such contributors should be exempted from the hazard of loss, and deemed creditors as against the right and interests of other fellow-contributors.

Exchange National Bank v. Plate.

Equitably all were members of the associations and were properly regarded by the court as claimants against the fund in that capacity, and not as creditors.

The decree is equitable and is affirmed.

Exchange National Bank v. Henry Plate.

69	489
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1. FRAUD AND CIRCUMVENTION—*Bona Fide Holder of Commercial Paper.*—In an action upon a promissory note, the execution of which is claimed to have been secured by fraud, it is material to the defense as against a *bona fide* holder, that the maker (defendant) had exercised due diligence and care in endeavoring to advise himself of the contents of the instrument before he signed it.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

STATEMENT OF THE CASE.

Assumpsit by appellant bank to recover on following instrument, viz.:

“\$500.00. CHICAGO, ILL., Feb. 1st, 1895.

One year after date I promise to pay to the order of Henry Metz, five hundred dollars, at 7 per cent. Interest payable annually. Value received.

H. PLATE.”

Indorsement: Pay to the order of Exchange National Bank of Polo, Illinois.

HENRY METZ.

Plea of the general issue, and special plea that the signature of appellee to the note was obtained by fraud and circumvention.

Verdict and judgment for appellee and appeal by the plaintiff below.

HARRY M. WAGGONER, attorney for appellant.

H. W. MASTERS, attorney for appellee.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The only defense was under the plea of fraud and circumvention.

Appellee's version of the manner in which he was induced to sign the note was that Metz, to whom the note is made payable, was indebted to him and that he was seeking to obtain payment; that Metz told him he could obtain the money wherewith to pay him from some bank in Chicago by depositing with such bank certain notes held by him (Metz) upon other parties, and by giving to the bank the note of Metz, with appellee as his surety. Appellee consented he would sign as security for Metz, and the latter afterward presented the instrument in evidence as being the note contemplated by the arrangement between them. Appellee can write his name but testified he could not read writing. He did not ask that the note be read to him but accepted Metz's statements, which were to the effect, in a general way, it was the note they had agreed to make.

The fraud and circumvention relied upon is that appellee believed the note was that of Metz as principal and himself as surety, payable to some bank, while in fact it was his individual note, payable to Metz.

The version given by Metz is materially different in many respects from that given by appellee, but if the verdict of the jury ought to be accepted as establishing the facts as testified to by appellee, still we are satisfied the verdict ought not to stand.

It was material to appellee's defense, as against a *bona fide* holder, that he had exercised due diligence and care in endeavoring to advise himself of the contents of the instrument before he signed it. Taylor v. Atchison, 54 Ill. 199; Leach v. Nichols, 55 Ill. 273; Holmes v. Hale, 71 Ill. 552.

The court, at the request of appellee, instructed the jury as follows:

The jury are instructed that the defendant has interposed

Exchange National Bank v. Plate.

as one of his defenses to said note what is known in law as fraud and circumvention in the obtaining of his signature to said promissory note, and if you believe from a preponderance of the evidence the defendant, Henry Plate, was induced by the said Henry Metz, the payee of said note, to sign the same by fraud and circumvention, then such written contract or note is void in the hands of the plaintiff in this case, although the same may have been regularly assigned to it, the plaintiff, by the said Henry Metz, the payee, before its maturity. And if you believe from a preponderance of the evidence introduced upon this trial the said Henry Plate, in ignorance of the character of the instrument sued upon, by the fraud and circumvention of the said Henry Metz, the payee, was induced to sign the said note, and then honestly believing that he was signing the note of said Metz as principal and defendant as surety, payable to some one other than Metz; then if you find the facts as last above stated, you should find the issues for the defendant.

The effect of this instruction was to declare the note void if obtained by fraud and circumvention and signed by appellee in ignorance of its true character, etc., and that without regard to the controlling question whether appellee exercised due or any degree of care to avoid being deceived.

Loss can not thus be cast upon the innocent holder of negotiable paper.

Moreover it is difficult to understand in what respect the note signed by the appellee differed in its legal effect from a note of the character he says he supposed he was signing. It is for the same, not a greater amount.

He was willing to become surety for Metz on a note for this amount, to be used by the latter wherewith to obtain money from a bank.

He did not know and it does not appear from his statement either party knew to what particular bank the application for the money would be made.

In such instances it is believed an ordinary and not unu-

VOL. 69.] Metropolitan Accident Ass'n v. Bristol.

sual mode of framing the "accommodation paper" is to adopt the form of note used on this occasion.

The liability of the appellee to the holder of a note framed in either manner is original, and such holder may look as well to the appellee as the sole debtor upon a note of the character he supposed he was signing as upon the one he signed.

As between appellee and Metz, the fact the former was surety only could be established and the rights of appellee in that respect preserved as well against one form of instrument as the other.

In order to constitute the defense here sought to be made it is essential the appellee should have been induced to sign a note prejudicially different in legal effect from the instrument he was willing to and thought he was signing. *Ryan v. National Bank*, 148 Ill. 349.

For the reasons indicated the judgment must be and is reversed and the cause remanded.

492
251 | **Metropolitan Accident Association v. Mary J. Bristol
Adm'x, etc.**

1. INSURANCE—*Rules of Mutual Company Should Be Enforced*.—It is the duty of courts and juries to recognize and enforce the conditions and limitations created by the members of mutual insurance companies, and they should not allow the funds of a company to be paid out in cases distinctly excluded from participation in the benefits of the order by the rules and regulations mutually agreed upon by the members.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Edgar County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the November term, 1896. Reversed and remanded. Opinion filed February 25, 1897.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellant.

JAMES A. EADS and DUNDAS & O'HAIR, attorneys for appellee.

Metropolitan Accident Ass'n v. Bristol.

MR. PRESIDING JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This was an action on a policy issued by the appellant company by the provisions whereof the company insured Richard A. Bristol (appellee's intestate) against personal injuries through "external, violent and purely accidental causes."

The policy was issued upon a written application of the assured for membership in the company, which contained a covenant upon his part that he would be bound by the "terms, conditions and limitations of the by-laws of the association," and in effect, that right of recovery under the policy should be subject to the conditions and limitations of the by-laws.

One of the by-laws provided the association should not be liable if death or injury should happen by "lifting or over-exertion" on the part of the assured or "in any case where there should be no external or visible signs of bodily injury."

The assured received personal injuries and brought suit to recover the indemnity contracted to be paid in case of total disability.

He died, pending the litigation, and appellee, as administrator of his estate, was substituted as party plaintiff.

The suit was instituted February 25, 1896, in Edgar county. The summons was sent to Cook county, the domicile of the company, and was there served.

The company, by pleas in the nature of pleas in abatement, based upon the theory it could only be sued in Cook county, questioned whether the Circuit Court of Edgar County had jurisdiction to proceed against it, and it has assigned as error that the court sustained a demurrer to these pleas.

The contention in this respect is the appellant company is neither a "fire" or "life" insurance company, within the meaning of those words as used in section 3 of the practice act, and hence that the provisions of that section authorizing the institution of suits against such companies in any county wherein the plaintiff resides, have no application to suits against it.

We need not follow the discussion of counsel *pro et con* upon this contention, for the reason the section in question was so amended by an act of the General Assembly, passed at the session in 1895, and in force July 1, 1895 (Session Laws 1895, p. 292) as to make its provisions applicable to insurance companies of every character.

The company filed three special pleas to the merits. In the first it was averred the injury received by the deceased was caused by "over-exertion;" in the second, that it was caused by "lifting," and in the third, that there was no external or visible signs of the alleged injuries.

An issue of fact as to the truth of the averment in each plea was raised and the cause submitted to a jury.

Verdict was rendered in favor of the plaintiff in the sum of \$640 and judgment thereon, and this appeal followed.

Appellee's position was that the assured, while trying to move a pump stock which was in a wall, slipped and fell and "wrenched, or twisted" his spinal column by the force or concussion of the fall. That of the appellant company that the injury to the spine was produced by "over-exertion" and in "lifting" the pump stock.

The assured dictated to his daughter and signed and sent to the company, as the basis of his claim for indemnity, the following statement of facts as to the manner of his injury:

PARIS, ILL., August 28, 1895.

Our well having gone nearly dry, we had it cleaned out on Saturday morning, August 24th, to see if that would help matters any. The next morning when I got up I looked into the well to see if there was any gain in the amount of water present. It appearing to me that there was a gain in the quantity of water in the well, I tried to start the pump by using water from the cistern to make valves work, but that failed. I then took hold of the pump stock with the intention of pulling it to the center of the well where the water looked deepest. It was in that effort that I felt a severe pain, as from a blow with a club at the small of my back. I fell to the ground at once, helpless and screaming with pain. My family assisted me into the house and to

Metropolitan Accident Ass'n v. Bristol.

bed, where I have been ever since and likely to be for some time to come. Dr. Tenbroeck, my family physician, was summoned at once. On his arrival he injected morphine sufficient to allay the intensity of the pain and somewhat relieved me. Since then I have lain in bed almost helpless, depending on members of my family for assistance when turning over or any other movement necessary to be made. The least sudden movement or jar or coughing causes intense pain for a few moments. The doctor has kept me under the influence of morphine most of the time since the accident occurred.

Dr. Tenbroeck is my family physician. I will raise no objection if the company desires an examination made by another physician or surgeon.

RICHARD A. BRISTOL.

Witness: EMMA JANE BRISTOL.

Unless for some reason this statement should not have been accepted by the jury as the true history of the manner of the injury, clearly the finding should have been that assured was hurt by "over-exertion" or "lifting."

The testimony of the daughter, who wrote the statement at the dictation of the assured, her father, is relied upon to overcome the account as given in the statement, and to establish the assured accidentally lost his footing and fell, and his spine was sprained or twisted by the fall or the concussion of the fall.

Her version of the occurrence was:

"The first thing that he (father) did was to pour considerable water in the pump in order to start it, but he did not succeed at that, and took hold of the pump and attempted to turn it around; didn't attempt to lift it, but to turn it around, where is would be in a little different position. I saw him after he took hold, but didn't see it immediately afterward. I saw him as he took hold of the pump, but turned my back immediately after that to attend to some of my duties; the next thing I heard his body fall, and heard him scream, and I looked around and found him lying on the platform. The sound of the fall was the first. Imme-

VOL. 69.]Metropolitan Accident Ass'n v. Bristol.

diately after the fall I heard the scream. I started to him at once. He was lying a little on one side, with his feet out to the south, his hand toward the north; I think he had his hand hold of the pump. That part of the platform on which he was lying at the time of his fall was wet. I think it was slippery."

Nothing so testified to by the daughter is necessarily inconsistent with the statement of the father; and the fact she reduced the statements to writing, and attested the same as a witness after he had signed it, tends strongly to the conclusion she regarded it then as correct.

She was not looking at her father at the time when, according to his statement, he was engaged in endeavoring to move or lift the pump-stock.

It was while making that effort, he says, he felt the first stroke of pain; a severe pain, as though from the blow of a club upon his back. The mere fact, she heard the sound made by the fall of his body before his cries of pain, is easily reconciled with his assertion he felt the pain, and afterward fell to the ground "screaming with pain."

The suggestion the assured was in such condition when dictating the letter that he might have been misunderstood, can have but little weight, for the reason his amanuensis was the only eye witness of the occurrence the details of which was the subject of the dictation. The opinion of the physician is consistent with either view of the manner of the infliction of the injury.

We are constrained to the opinion that the finding of the jury the injury was not caused by "lifting" or "undue exertion," was manifestly against the weight of the evidence.

The deceased and other members of the appellant association composed the association.

It is a mutual company, organized and maintained by such members for the sole purpose of providing aid to such of the members as might be injured by purely accidental causes, and they mutually agreed its benefits should not extend to injuries which a member brought on by "lifting" or "over-exertion." The duty of courts and juries is to

C. & A. R. R. Co. v. Hall.

recognize and enforce the conditions and limitations created by the members of the association.

This duty is violated and power unlawfully usurped if, out of mere sentiments of sympathy, courts and juries appropriate the funds of the association to the payment of benefits in cases not contemplated to be insured against by the assured and his fellow members, and distinctly excluded from participation in the benefits of the order by the rules and regulations mutually agreed upon by such members.

As the case must be again tried it is not appropriate we should say more upon the issue, whether there was external and visible signs of injury, than that we do not regard the verdict unsupported by the testimony in that respect.

For the reasons indicated, the judgment must be reversed and the cause remanded.

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**Chicago & Alton Railroad Company for the Use of
the Lake Erie & Western Railroad Company v.
J. F. Hall.**

1. COMMON CARRIERS—*Freight Charges—Connecting Lines.*—Where the initial carrier has received the amount of its charges from the connecting and final carrier the right of action to recover freights is assigned to the latter by operation of law, and an action therefore will not lie in the name of the initial carrier.

Assumpsit, for freight charges. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

A. E. DE MANGE, attorney for appellant.

ROWELL, NEVILLE & LINDLEY and WILL & WHITMER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee to recover the amount of certain freight tariff charges, for transporting five car loads

VOL. 69.]C. & A. R. R. Co. v. Carlock.

of cattle from Curryville, Missouri, to Bloomington, Illinois. It appears the cattle were consigned to Carlock, a station on the line of the Lake Erie & Western Railroad, and were transported by the Chicago & Alton Railroad Company from Curryville to Bloomington, where they were delivered to the Lake Erie & Western Railroad Company, which company paid the charges of the former company for the service rendered by it and then transported the cattle to the point of destination.

The case was tried by the court and judgment was for appellee on the ground that as the initial carrier had received the amount of its charges from the connecting and final carrier, the right of action therefor had been assigned to the latter by operation of law and that the action would not lie in the name of the initial carrier.

Relying upon the authority of *Bissell v. Price*, 16 Ill. 408, we are of opinion this ruling was correct and the judgment will therefore be affirmed.

Chicago & Alton Railroad Company, Use of, etc., v. J. F. Carlock.

1. COMMON CARRIERS—Assignment of *Freight Charges*.—This case follows the preceding case and is governed thereby.

Assumpsit, for freight charges. Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

A. E. DE MANGE, attorney for appellant.

ROWELL, NEVILLE & LINDLEY and WILL & WHITMER, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The question here is the same as in the preceding case. For the reason there stated the judgment will be affirmed.

Switzer v. Kee.

Theodore B. Switzer, Special Adm'r, etc., v. Samuel Kee, Executor, etc.

1. **APPEALS—*By Special Administrators.***—Before a special administrator, appointed to defend a claim against an estate, can be allowed costs and attorney's fees incurred on an appeal from an order allowing the claim, it must appear that he acted in good faith and with reasonable prudence in appealing. The question, whether an order of the Probate Court authorizing the appeal is necessary, is raised but not decided.

Claim in Probate.—Appeal from the Circuit Court of McDonough County; the Hon. CHARLES J. SCHOFIELD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed February 25, 1897.

SHERMAN & TUNNICLIFFS, attorneys for appellant.

BAILY & HOLLY, attorneys for appellee.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.
Samuel Kee, being executor of Mary Kee, deceased, and having a demand in his favor against the estate, Theodore B. Switzer was appointed special administrator to represent the estate.

The County Court, after hearing the evidence offered on both sides, made an allowance of \$500 in favor of the claimant, from which he prosecuted an appeal to the Circuit Court. The special administrator also appealed. In the Circuit Court the claimant recovered \$1,200, and the special administrator appealed to the Appellate Court, where the judgment was affirmed. He then took the record to the Supreme Court on a writ of error, and was again defeated.

Afterward, he presented his report as special administrator to the County Court, asking an allowance for the expenses of the entire defense, including costs and attorney fees in the Appellate and Supreme Courts. The allowance was made, and an appeal was prosecuted by the executor

VOL. 69.]Switzer v. Kee.

to the Circuit Court, where the allowance was reduced by rejecting the costs and attorney fees incurred in the Appellate and Supreme Courts, and now the special administrator brings the latter judgment here by appeal, and assigns error.

The case being tried before the court without a jury the special administrator submitted several propositions of law, of which the following was No. 1:

"The special administrator had the right under the law to appeal from the judgment of the County Court to the Circuit Court, and from the judgment of the Circuit Court to the Appellate Court, and also had the right under the law to prosecute a writ of error from the Supreme Court to the Appellate Court in the matter of the claim of Samuel Kee v. The Estate of Mary Kee, provided he acted in good faith and with reasonable prudence in so doing."

It was marked "held" by the court. It will be noticed that the right to recover the costs and expenses in question was thereby made to depend upon whether the special administrator "acted in good faith and with reasonable prudence."

The same limitation is found in the third, fourth and fifth propositions, which were also "held." Thus the points of good faith and reasonable prudence were conceded by the special administrator to be before the court for determination, and properly so. Woerner on Law of Administration, Sec. 516. It must have been found that in removing the case to the Appellate and the Supreme Courts there was either a want of good faith or reasonable prudence or both.

It appears that there were seven heirs, four of whom were represented by the executor, he being one and having acquired the shares of three more. After the case had been determined in the Circuit Court, he stated the fact of his interest to the special administrator and urged him not to protract the litigation by further appeal. None of the heirs, either those represented by the executor, or the others, asked the special administrator to make further defense nor were they consulted by him about it. He acted solely

Mann v. Martin.

upon his own judgment and the advice of his attorney. In thus acting, he subjected himself to the imputation of being governed by a desire to make business for himself and his attorney rather than to protect the estate, and if the court so found, the finding is not without support in the proof. The court was also warranted in finding that such action, if in good faith, was not reasonably prudent. On examining the record of the case, as it appears from the reports in the Appellate and Supreme Court, it is apparent that the main question was one of fact, upon which there was no reasonable ground to expect a reversal. In the opinion originally filed we held that the appeal to the Appellate Court and the writ of error from the Supreme Court were improperly taken because not authorized by an order of the County Court, but upon considering the petition for rehearing, we think it advisable not to rest the decision upon that ground. The judgment of the Circuit Court may be affirmed upon the view already stated and it is therefore unnecessary to determine whether an order of the County Court was required to authorize such action by the special administrator.

The opinion heretofore filed herein is modified and the rehearing denied, the judgment of the Circuit Court being affirmed.

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Andrew Mann, Executor, etc., v. John C. Martin, Executor, etc.

1. **ACCOUNTING—Where Identity of Property is Lost.**—Where a person who is entitled to the use of personal property for life, necessarily commingles it with other property subsequently received from other sources, and its identity is thereby lost, upon an accounting the amount thereof should be ascertained as nearly as possible, but exactness is not required.

2. **WILLS—Construction of, by Trial Court in This Case Sustained.**—The court reviews the evidence and holds that the decree herein substantially carries out the intentions of the parties, as disclosed by their wills, and that it is responsive to the merits of the cause.

VOL. 69.]

Mann v. Martin.

Bill, for the construction of a will and an accounting. Error to the Circuit Court of Douglas County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the November term, 1896. Affirmed. Opinion filed February 25, 1897.

THOMAS W. ROBERTS and ECKHART & MOORE, attorneys for plaintiff in error.

JOE H. WINKLER, attorney for defendant in error.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

The defendant in error filed his bill in chancery against plaintiff in error and therein alleged that on the 28th of September, 1882, Bernard Truax made his last will and testament whereby he disposed of his estate as follows:

"First. I give and bequeath to my wife, Lydia Truax, all of my property, both real and personal, now owned by me and in my name, together with all moneys on hand or in bank, to have the free and unrestricted use, possession and benefit of the same so long as she may live, obligating her to do and perform the matters and things hereinafter set forth, to wit:

To pay the girl now living with us, to wit, Judy Braden, when she has become of age, \$500, and further, that she pay all of my just debts and funeral expenses, etc.

And it is my further wish and will that at the death of my wife that my executor sell at public vendue all of said property, left by her, both real and personal, on a credit of twelve months, securing the same fully by personal security and mortgage, and when said proceeds are collected to divide the same equally between my brothers and sisters, to wit (here naming them):"

That said Bernard Truax died October 27, 1882, and said will was duly probated, the said John C. Martin, complainant, being appointed executor, and that he turned over all the property, real and personal, of the testator to the said Lydia Truax for her use during life. That said Lydia paid the funeral expenses and the debts, and also the legacy of \$500 to said Judy Braden when she came of age. That the

THIRD DISTRICT—NOVEMBER TERM, 1896. 503

Mann v. Martin.

said testator owned at the time of his death 165 acres of land, had to his credit in bank \$2,278.74, and owned live stock and other personal property of the value of \$1,000. That the said Lydia took possession of all of said property real and personal, and enjoyed the same according to the said will until September 9, 1894, when she died, leaving a will wherein she provided as follows :

“First. I give and bequeath to Lydia Sweezy \$500 and my wearing apparel and family bible, she being the daughter of Andrew Mann.

Second. I give to Lydia Sipes the sum of \$700, she being the daughter of Valentine Mann and Susanah Mann.

And Lydia Underwood the sum of \$700, she being the daughter of Bernard Mann and Maria Mann, and \$700 to Lydia Alexander, she being the daughter of Ignatius Small and Esther Small. The remainder to be divided equally between Lydia Sipes, Lydia Underwood and Lydia Alexander.

This being money received by me, Lydia Truax, the wife of Bernard Truax, deceased, from my father, Andrew Mann, deceased, and from my brother, Michael Mann, deceased.

And it is my further wish and will that at my death that my executor proceed to collect and pay over the moneys to the aforesaid Lydia Sweezy, Lydia Sipes, Lydia E. Underwood and Lydia Alexander the aforesaid amount of money received, being about \$3,000 and interest accrued thereon since received.”

That Andrew Mann was appointed executor under said will and filed his inventory showing the personal estate of said Lydia Truax, as follows: \$747.18 in chattels, \$412 in cash, \$5,573.13 in promissory notes, total, \$6,737.31, and alleging that of this sum \$3,737.31, being the excess over the sum really owned and disposed of by her in her will, should be accounted for to the complainant as the executor of said Bernard Truax, but that the said Martin, executor of said Lydia Truax, refused to so account. Complainant therefore asked for a construction of the will of said Barnard Truax, and that said Martin as such executor might be required to account and pay over, etc.

The answer denied that the complainant was entitled to the relief sought, though admitting many of the facts alleged in the bill.

Upon a hearing the court entered a decree according to the prayer of the bill for \$3,133.74, as a sixth-class claim, to be paid in due course of administration. The defendant executor has brought the record here by writ of error, and seeks a reversal of the decree.

It appears that Bernard Truax left 165 acres of land, which said Lydia occupied by herself or by tenants up to her death, that the rental value of the same was \$3 per acre per annum, and that she received in cash, and in the proceeds of chattels, from his estate, \$3,378.74; that she paid out \$785.10 upon said legacy to said Judy Braden, and upon debts and funeral expenses of said Bernard, including the sum of \$60 for a monument.

It appears also that in the year 1857, which was a few years after her marriage to said Bernard, she received from her father's estate the sum of \$500, which she placed in the hands of her said husband, who used it in the improvement of the farm, which was their home up to the time of his death, and hers thereafter till her death; that a short time before his death she received from her brother's estate \$270, of which \$245 was deposited in bank to the husband's credit, and that after his death, viz., in the years 1886 and 1888, she received from her father's estate \$2,696.43. For about two years after her husband's death she conducted the farm herself, after that time she rented it and boarded with the tenant in part payment of the rent. The income of the farm during that time was about \$300 per annum, in addition to her board and the use of the room reserved by her. Her outlay for clothing, etc., was about \$100 per annum.

An extended argument has been presented on behalf of plaintiff in error to induce a conclusion, different from that of the Circuit Court, and many authorities are cited, but in this case, as in most others involving a construction of testamentary provisions, not much light is shed by other adjudged cases, because the language construed in them is more or less unlike that under consideration.

Mann v. Martin.

In using and enjoying the personal property Mrs. Truax necessarily commingled it with what she subsequently received from other sources, and its identity is thereby lost, but upon an accounting in respect thereto, the amount thereof must be ascertained as nearly as possible.

As already stated, the personal property she so received from the estate of her husband amounted to \$3,378.74, and this sum, less the \$245 received by her husband a short time before his death, is the sum found due by the decree. It is highly probable, indeed quite certain, that the income from the farm was more than enough for her support, and is not at all unreasonable to estimate that the income from the personal property with the surplus from the rent of the farm was more than sufficient to make up the sum she expended in paying the legacy and the debts, \$785.10. This is quite a liberal view to take of the matter, and leaves, as properly belonging to her separate estate, \$3,604.57. Turning to her will, it is evident that she had no purpose to dispose of anything except what she had derived from her father and brother, "being about three thousand dollars, and interest accrued thereon, since received," as explicitly stated in the last quoted clause of said will.

This estimate agrees very well with the facts. She received from her brother, just before her husband's death, \$245. She received from her father's estate, in 1886 (or '87), \$790.19, and in July, 1888, from the same source, \$1,901.24—in all \$2,936.43. It is not likely that she received more in the way of interest on these amounts than would make up the difference between the total and the amount left to her estate by this decree—some \$668—unless she had it all constantly at use, which is not very probable.

Looking at the circumstances of the parties, it is easy to see why they so disposed of their property. They were married in 1857.

He then had the land referred to, and not long after she received \$800, which was used to improve it. They lived together on the land until 1882, when he made his will just before he died. They then had no children, but each had

VOL. 69.]Mann v. Martin.

relatives. It was but natural and proper that after she was done with the real and personal property belonging to him it should revert to his relatives, leaving her free to give to hers, if she chose, her expectant inheritance from her father. They evidently understood the matter alike, and she had no disposition to lessen what she received from him by useless expenditures. When she came to make her last will she assumed only to dispose of the proceeds of her inheritance from her brother and father, leaving what remained of her husband's estate out of consideration. We are of opinion the decree herein substantially carries out the intentions of these parties, as disclosed by their wills, and that it is, therefore, responsive to the merits of the cause. It will be affirmed.

CASES

IN THE

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APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1897.

Henry R. Bond v. The Pennsylvania Company.

1. **EQUITY PLEADING—*Demurrers After Answer.***—A defendant can not, after he has answered an original bill, put in a general demurrer to the entire bill, as amended, because the answer to the original bill will overrule the demurrer. The defendant must, in such case, confine his demurrer to matters introduced by amendment.

2. **STREETS—*Use of, by Railroad When Fee Remains in Abutting Property Owner.***—Where the fee of a street remains in the abutting property owner, the corporation may grant the right to a railway company to lay its tracks along or across such street, but if, in laying its track, the company causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained.

3. **COURTS OF EQUITY—*May of Their Own Motion Dismiss Bills Showing Existence of Remedy at Law.***—It does not follow, because a defendant has not, as a defense, insisted that the complainant has an adequate remedy at law, that a court of chancery will give the complainant the particular remedy which, in such forum, he seeks.

Bill, for an injunction. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March, 15, 1897.

STATEMENT OF THE CASE.

This suit was for an injunction and for general relief, and was dismissed below upon a general demurrer filed by the defendant.

The complainant owns lots 1 and 2, in United States Bank addition to Chicago, located at the southeast corner of 23th street and Stewart avenue. They have a frontage on the latter of 232 feet and extend eastward on 26th street for the distance of a block. Up to 1888 Stewart avenue was but sixty-six feet wide. In that year it was by ordinance widened to ninety-nine feet by condemning a thirty-three foot strip off of all the property abutting on the east, including complainant's lots.

Complainant in his bill charges that he owns the fee to the center of Stewart avenue.

In 1888, and prior thereto, the defendant had two railroad tracks in Stewart avenue. In the fall of 1889, the defendant, under an ordinance purporting to give authority to that end, made preparation to lay two additional tracks (making four in all) lengthwise in the bed of the original street (being the west sixty-six feet of the avenue as widened) and to erect a wall or fence lengthwise along the east line of the same portion, with the purpose of separating the new thirty-three foot strip from the other, and thus appropriate the original bed of the street exclusively to railroad uses. The apparent consideration for this permission to use the old street, was an agreement by the defendant to pay the cost of the thirty-three foot strip, and the expense of fitting up the latter for a street. Before any part of these proposed "improvements" had been begun, complainant filed this bill to enjoin its progress, upon the theory that such exclusive appropriation of the old portion of the avenue to a single mode of travel was unlawful; that the ordinance purporting to authorize the same was void, as beyond the power of the city council; that the proposed seizure by defendant of land whereof complainant owns the fee was not merely an indirect or consequential damage to him as an abutting owner, but amounted to a direct physical "taking" of his property without compensation; or, if not so, then the laying of two more tracks for a steam railroad at least imposed an additional servitude, for which compensation must be paid as a condition precedent to its enjoyment.

Bond v. Pennsylvania Co.

The bill was, August 27, 1895, amended to set forth that since and before 1886 the defendant has itself owned a large number of lots in United States Bank addition, fronting on Stewart avenue, and that it held the same through mesne conveyances, from William Garnett, the maker of the plat, under whom the complainant also derives title; and that the defendant had bought with reference to and according to the same plat and under the same common grantor with complainant.

Prior to the filing of the demurrer which was sustained the cause had proceeded as follows:

October 28, 1889. Bill filed in same form as at present, except (1) that the Fort Wayne Company, the Chicago & Western Indiana Company and the city of Chicago were originally named as parties; and (2), that the averments as to defendant holding property in the United States Bank addition, under the same grantor as complainant, have since been added.

December 7, 1889. Pennsylvania Company obtained from plaintiff a stipulation for fifteen days more time to answer or demur.

December 18, 1889. Answer of Pennsylvania Company (verified) filed, admitting many, and denying other, averments of the bill, but raising no question as to the jurisdiction of equity, or the adequacy of the legal remedy.

November 22, 1891. General replication filed.

July 14, 1893. Bill amended by omitting Pittsburg, Fort Wayne & Chicago Railway Company and city of Chicago as parties.

July 14, 1893. Pennsylvania Company's answer ordered to stand to bill as amended.

July 14, 1893. Order that replication stand to answer.

July 14, 1893. Cause referred to master to take proofs and report.

July 18, 1893. Demurrer filed by Pennsylvania Company, (1) for general want of equity, (2) that Pittsburg, Fort Wayne & Chicago Railway Company is a necessary party.

October 15, 1894. Demurrer overruled. Defendant obtained leave to have answer stand as answer to amended bill.

June 7 to June 12, 1895. Testimony on part of complainant taken before master, company's attorney there appearing and participating.

June 7, 1895. Stipulation by Pennsylvania Company as to certain facts, viz., that when the ordinance mentioned in the bill was proposed and passed, the Pittsburg, Fort Wayne & Chicago Railway Company (and the Pennsylvania Company, its lessee,) owned a number of lots abutting on Stewart avenue, on the east side thereof; that some of the same were located in the United States Bank addition; that they acquired all their lots in said addition by mesne conveyances from William Garnett, the original dedicator (being the same person under whom complainant holds his title).

August 27, 1895. Bill amended by alleging that the company owns lots in United States Bank addition, abutting on Stewart avenue, and derives title thereto under the same grantor as complainant, as hereinbefore set forth.

September 4, 1895, the sustained demurrer was filed.

RITCHIE, ESHER & WOOLLEY, attorneys for appellant.

LOESCH BROTHERS & HOWELL, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged by appellant that appellee having answered the bill, as first filed, could not urge as a ground of demurrer to the amended bill, that thereby it appeared that the complainant had an adequate remedy at law.

The bill as first filed was based upon the theory that the complainant, being the owner of the fee of the street, had a right to have its use confined to purposes which were not inconsistent with the common use to which streets are devoted. By the amendment, the complainant urged as an additional ground of relief that there existed between him

Bond v. Pennsylvania Co.

and the defendant such contractual relations as bound the defendant not to use any portion of the street in such manner as virtually to exclude him, the complainant, from using the same in the ordinary way.

There was by the amendment no abandonment of the ground for relief urged in the original bill, nor any change in the relief sought; there was merely set up an additional reason for relief.

The defendant might have answered the amended bill, entirely abandoning the matters set up in his first answer and insisting upon other defenses, but he could not demur to that which he had already answered, and his demurrer should have been confined to the amendment.

One can not answer and demur to the same matter.

An amendment to a bill, however trivial and unimportant, authorized a defendant, though not required to answer to put in an answer, making a new defense and contradicting his former answer. An amendment to a bill does not, however, enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open, unless the nature of the case made by the bill has been changed by the amendments. Daniell's Ch. Pr., Vol. 1, p. 409, 5th Am. Ed.

A defendant can not, after he has answered an original bill, put in a general demurrer to the bill as amended, because the answer to the original bill will overrule the demurrer. The defendant must, in such case, confine his demurrer to matters introduced by the amendment. 1 Dan. Chy. Pr., 583, 5th Am. Ed.

The defendant could not, therefore, urge as a demurrer to the entire bill as amended, that the complainant had an adequate remedy at law, because no such defense to the original bill was insisted upon in the answer filed thereto.

The original and amended bill is an attempt by an abutting owner, holding also the fee of the street, to restrain the use of the highway for a public purpose.

The construction of the fence is immaterial. By the laying of tracks for a steam railway and the passing of locomotives

and trains thereon, the use of so much of the street as is so occupied, in ordinary modes, is practically prevented, the fence is for the protection of those using the remainder of the street from injury by the cars and locomotives of the defendant.

It does not appear that the thirty-three feet reserved for ordinary use is not sufficient for such purpose.

We do not regard the case of Field v. Barling, 149 Ill. 556, which was an attempt to put a portion of a street to an exclusive private use, nor Ligare v. The City of Chicago, 139 Ill. 46, as inconsistent with the doctrine of Tibbets v. The West and South Towns St. Ry. Co., 54 Ill. App. 180, 153 Ill. 147; Stewart v. Chicago General Railway Co., 58 Ill. App. 446; Philips v. Lake St. R. R. Co., 60 Ill. App. 471; Moses v. Pittsburg, Ft. Wayne & Chicago R. R. Co., 21 Ill. 516; Murphy v. Chicago, 29 Ill. 279; Stetson v. Chicago & Evanston R. R. Co., 75 Ill. 76; Patterson v. Chicago, Dan. & Vin. R. Co., 75 Ill. 588; C., B. & Q. R. R. Co. v. McGinnis, 79 Ill. 269; P. & R. I. Ry. Co. v. Schertz, 84 Ill. 135; Rigney v. Chicago, 102 Ill. 64; Penn. Ins. Co. v. Heiss, 141 Ill. 35; Corcoran v. Chicago, Mad. & Northern R. R. Co., 149 Ill. 291; White v. Metropolitan Elevated R. R. Co., 154 Ill. 620; and Chicago, B. & Q. R. R. Co. v. West Chi. St. R. Co., 156 Ill. 255; which are to the effect that a private individual may not restrain the lawful use of a public street for a public purpose.

It does not follow because the defendant has not, as a defense, insisted that the complainant has an adequate remedy at law, that a court of chancery will give to him the particular remedy which in such forum he seeks.

It is not claimed that the defendant is insolvent or unable to respond to any judgment which the complainant may recover, as was the case in Langabier v. Ry. Co., 64 Ill. 243.

We therefore think that the complainant should be left to his action at law, and we see no reason for concluding that such remedy has been lost by *laches*.

The trespass, if such there be, has continued to this day.

The Supreme Court in I. B. & W. R. R. Co. v. Hartley et

Young v. Rutan.

al., 67 Ill. 439, said: "The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner the corporation may grant the right to a railway company to lay its tracks along or across any street, but the company avails itself of its privilege at its peril. If, in laying its track, it causes a private injury to him who owns the fee in the adjoining premises, it must make good the damages sustained."

Appellant has not shown by his bill that he is entitled to restrain the use for a public purpose of this public street.

The ownership of the fee gives him no such right, nor does the contractual relation existing between him and appellee.

The decree of the Circuit Court is affirmed.

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James N. Young v. Frank C. Rutan.

1. **PRACTICE—Separate Appeals may be Joined as One Case.**—When two or more persons having the right to appeal from a judgment or decree assign errors separately and prosecute appeals from such judgment or decree it is proper to join and docket such appeals as one case.

2. **RECEIVERS—Should be Appointed Only on Specific Allegations Sustained by Credible Evidence.**—It is no slight matter for a court of chancery to lay its hands upon large business enterprises, take them out of the control of capacity and experience and charge them with expenses and commissions, and it should be done only when the court can point to a specific allegation or allegations, sustained by credible evidence, that will justify such action.

3. **SAME—Possibility of Improper Acts by Officer of Corporation Not Ground for Appointment of.**—That an officer of a corporation is in a position where he may betray his corporation will not justify the appointment of a receiver therefor when there is no evidence to establish the probability that he will betray it.

Bill for a Receiver and Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Reversed with directions. Opinion filed March 15, 1897.

W. S. COY and GREEN, ROBBINS & HONORE, attorneys for appellants.

RALPH H. SMITH, attorney for appellees; ALDRICH, REED, FOSTER & ALLEN, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Under the above title a record is filed here in which is shown not only an appeal by the above named appellant, but also an appeal by James N. Young & Co., a corporation of Illinois. Both appeals are from an interlocutory order of January 4, 1897, appointing a receiver of the effects of the corporation, and enjoining Young, the president, from collecting or disposing of some orders for money belonging to the corporation. The appellee has moved to dismiss the appeals as being improperly joined and docketed as one case. The appellants have separately assigned errors. Such a mode of proceeding has been usual in the practice in this State, and without objection. Often a decree is reversed as to some and affirmed as to others, in the same case, upon their several appeals. And the practice may be commended for the same reason that the Supreme Court gave for permitting several land owners to join in a writ of error to review a judgment for taxes. Olcott v. State, 5 Gilm. 481. The motion is denied.

The reasons for the decision in County of Sangamon v. Brown, 13 Ill. 207, do not apply here.

The case is that the appellee filed a bill in which he alleged that the corporation owed him—as assignee of F. C. Helm and Frank B. Modica—at least \$2,500; that he held twenty shares of the 3,000 shares of the capital stock of the company; also that as such assignee he is entitled to many more shares.

As a creditor the appellee has no standing in equity. He has no judgment, nor is the bill filed under section 25 of the act concerning corporations. That part of his case may be dismissed from our consideration.

His bill claims that Young wrongfully holds the shares (other than the twenty) to which the appellee is entitled—but in that quarrel the corporation has no interest. If the bill were confined to that, however, it is likely that the cor-

Young v. Rutan.

poration might be a proper, if not necessary, party in order that a decree, if the appellee should be successful, might be enforced; but of itself the controversy as to the ownership of shares would be no ground for the order appealed from.

The real gist of the bill is the alleged past—and reason to fear future—misconduct by Young as president.

We assume that it is sufficiently shown that he has, in effect, controlled the corporation; and left alone would continue to control it.

The orders for money before spoken of are, as stated in the order appealed from, thirteen in number, issued on behalf of the corporation directing the payment of, in all, \$16,000 to Young.

Whether there be any well grounded reason to fear that Young will not deal justly with those orders, or with the money he may receive upon them, if they are paid, is really the whole question in the case; and in considering that we shall enter into no investigation of the affairs of any former corporation, engaged in other business, to learn whether Young may be charged with misconduct there. If we should do so we must hear both sides, and try a cause collaterally in which the appellee had no interest. One case at a time is enough.

The corporation, Young & Co., was a construction company building a railroad in Canada.

It is certain that in the five years of its existence from 1889 to 1894, the corporation, and Young individually, had exhausted their means and credit in the construction of the road, and then Young, for the corporation, made an arrangement with a capitalist by which another construction corporation was organized, which has nearly or quite completed the road, and from which capitalist or corporation the money in controversy is to come.

For two years before the assignment by Helm and Modica to the appellee, and before which assignment the appellee had no interest, Young had carried the business of the company to the stage which it had reached when this bill was filed, without dissent, and apparently without aid or participation by Helm or Modica.

The appellee stands in their shoes, and can not question the wisdom of any of Young's acts, especially as he is now, by this bill, asking that the fruits of such acts be preserved for his benefit.

Whether the books of the company have been kept so as to meet the approval of expert accountants; whether the corporation, having got substantially through with the one railroad, has as yet any other construction on hand or, not having, has ceased to do business; whether the corporation meetings have been regularly held, are unimportant inquiries.

The allegations of the bill are positive, none on information or belief—and verified by the oath of the appellee—that the bill "is true in substance and in fact, except as to the allegations therein stated to be upon information and belief." It is clear that the appellee never had personal knowledge of most of the matters stated in the bill.

The bill is also verified by the similar oath of Helm.

The bill charges as a fault of Young that he, "without authority from Helm or Modica, in 1894," made the arrangement hereinbefore mentioned through which the work of construction was continued; and yet in an affidavit made by Helm, used in obtaining the order for a receiver, he claims credit for being "the means of bringing into this enterprise" the people with whom Young made that arrangement. The appellee made no affidavit on the application for a receiver, for the reason, no doubt, that he knew nothing of his own knowledge touching the controversy.

There is much loose allegation in the bill about conspiracy, fraud, "tool and accomplice," denial of access to books, etc., etc. The one allegation which, if supported, would have justified the order appealed from, is that in that arrangement through which the work was continued, Young secretly stipulated that he should personally receive \$100,000 for bringing it about.

Of the truth of this allegation there is not a scintilla of proof; on the contrary, it is proved that it is false.

That Young is in a position where he may betray his cor-

Barclay v. The People.

poration may be admitted, without tending to establish the probability that he will betray it.

Nor will such an admission justify the appointment of a receiver upon the ground, as stated in the brief of the appellee, that "the receiver will do no harm." It is no slight matter for a court of chancery to lay its hands upon large business enterprises, take them out of the control of capacity and experience, and charge them with expenses and commissions.

It should be done only when the court can point to the specific allegation or allegations, sustained by credible evidence, that will justify such action.

There is no such case here, and the order appealed from is reversed with directions to discharge the receiver, return the effects of the company to the custody from which they were taken, and dissolve the injunction.

The appellee to pay the costs and expenses here, and of the receivership.

Reversed, with directions.

John Charles Barclay v. The People of the State of Illinois.

1. **JUDGMENTS—Must be Sustained by the Record.**—A record, certified to as true, perfect and complete, consisted of a placita and an order entitled, "People of the State of Illinois v. John Charles Barclay," committing said Barclay to the county jail for having refused to pay "arrears of alimony due in this cause." *Held*, that the record did not sustain the order, as alimony could not be due to the People of the State of Illinois.

Contempt Proceedings.—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1897. Order reversed. Opinion filed March 15, 1897.

ALEX. J. JONES, attorney for plaintiff in error.

JAMES MAHER, attorney for defendant in error.

VOL. 69.] Hines v. Union National Bank of Chicago.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION
OF THE COURT.

The entire record in this cause consists of a placita and an order entitled in the case of "People of the State of Illinois v. John Charles Barclay," and is certified to us by the circuit clerk as being "a true, perfect and complete transcript of the record in a certain cause lately pending in said court, on the chancery side thereof, between the People of the State of Illinois, complainants, and John Charles Barclay, defendant."

The order is one of commitment of the plaintiff in error to the county jail for having refused to pay "arrears of alimony due in this cause." Nowhere in the order nor anywhere else, is any other cause mentioned or party named, except the People on the one side, and John Charles Barclay on the other.

It is impossible to conceive of alimony being due to the People of the State.

The order is reversed.

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Edward Hines v. Union National Bank of Chicago
and Samuel B. Barker.

Same v. Same.

1. PROMISSORY NOTES—*Effect of the Word Non-Negotiable When Used in.*—While there is nothing in the mere fact that a note is made by its terms "non-negotiable," which can prevent its assignment so as to vest in the assignee the right to sue upon it in his own name, yet, such a note when assigned, is subject to all the equities existing between the maker and the payee at the making thereof, or which may arise between them up to, at least, the time when the maker acquires notice of its assignment. The word "non-negotiable" written across the face of a note charges the assignee with notice of every fact which inquiry of the maker would reveal.

2. GUARANTY—*Amount Due, but Unpaid on. Allowed as a Set-off.*—A executed a note to B, which was by its terms non-negotiable, and B assigned the note to C. Before receiving notice of the assignment, A guaranteed the payment of certain notes given by B to D, and B becoming

Hines v. Union National Bank of Chicago.

insolvent he paid part of the amount due on the notes and they were assigned to him, D holding his guaranty for the amount still unpaid. *Held*, that A was entitled to set-off against his note to B in the hands of C, the amount due on his guaranty to D.

Bill, for an injunction, etc., and order refusing leave to file a bill of review. Appeals from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. First case reversed with directions, appeal dismissed in the second case. Opinion filed March 15, 1897.

MORAN, KRAUS & MAYER, attorneys for appellant

TENNEY, McCONNELL & COFFEEN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

These two appeals were separately docketed, and by order of court were submitted upon one record, with separate assignments of error, and upon one set of abstracts and briefs.

One appeal is from the original decree in the cause, and the other is from an order refusing leave to file a bill to review and reverse such decree.

On or about September 29, 1892, the appellant executed and delivered to the appellee, Samuel B. Barker, his certain non-negotiable promissory note, dated and in words and figures as follows:

“\$15,000. CHICAGO, June 27, 1892.

On or before May 1, 1895, after date, I promise to pay to the order of S. B. Barker \$15,000, at his office in Chicago, value received, with interest at seven per cent from date until paid. This note is non-negotiable.

EDWARD HINES.”

And, at the same time, he delivered to said Barker certain certificates of shares of stock, for which Barker gave to him a receipt as follows:

“CHICAGO, September 29, 1892.

Received of Edward Hines, 150 shares of stock of the Edward Hines Lumber Company, certificate No. 24 for

VOL. 69.] Hines v. Union National Bank of Chicago.

fifty shares, No. 23 for 100 shares, as collateral security for a certain non-negotiable note for \$15,000, dated June 27th, for three years.

S. B. BARKER."

Such certificates were indorsed by Hines, but no transfer of them upon the books of the Lumber corporation was ever made.

Afterward, and some time between October, 1892, and May 29, 1893, Barker indorsed the note and delivered it, with the share certificates attached, to the appellee, Union National Bank, as collateral security to former loans made by the bank to Barker.

Of such transfer by Barker to the bank, Hines had no notice or knowledge until at about the date of maturity of the note, on May 1-4, 1895. Prior to that time Barker failed in business, and has ever since continued to be wholly insolvent.

On May 16, 1895, which was shortly after the note matured, the bank brought suit on the note against Hines, who to that action pleaded specially certain matters of defense, which will be mentioned later, and included the same facts that are stated in the bill herein, and claimed an offset, and to such plea the bank filed replications.

On March 17, 1896, and while said action at law upon the note remained pending, the bank served notice upon Hines that it would, on the twenty-eighth day of that month (changed by agreement to April 4, 1896), offer said stock certificates at public sale.

Thereupon, on April 3, 1896, the original bill in this cause was filed by Hines. Such bill averred, in substance, the foregoing facts, except that the note and stock certificates were delivered by Barker to the bank in April, 1893, and further averred an additional set of facts, upon which, together with those that have been mentioned, it was prayed for an injunction against the bank from selling the stock, for an accounting, and for a surrender of the stock certificates. A cross-bill was filed by the bank whereby it was prayed that its alleged lien upon the stock might be foreclosed by

Hines v. Union National Bank of Chicago.

a sale thereof under the direction of the court, and that the proceeds arising from such sale might be applied *pro tanto* in payment of said note, and that Hines be decreed to pay the remainder.

The additional facts relied upon by appellant and set up in his bill were, in substance, that on or about March 21, 1893, Barker requested him, Hines, to guarantee to McElwee & Carney, lumber dealers, his, Barker's, notes for about \$21,000, given for lumber purchased by Barker, but a delivery of which was withheld, and that Hines, in pursuance of such request, did guarantee Barker's said notes to McElwee & Carney, to the extent of the amount of his, Hines', said non-negotiable note for \$15,000 to Barker, and that Barker held and owned said \$15,000 note, and held said certificates of stock at the time such guaranty by Hines to McElwee & Carney was given; that Barker, becoming and continuing to be insolvent, defaulted in the payment of the notes to McElwee & Carney, so guaranteed by Hines, and that Hines has been compelled to pay and take up said notes.

The alleged request by Barker to Hines, and the latter's guaranty to McElwee & Carney, were evidenced by the following letters:

“CHICAGO, March 21st, 1893.

FRIEND HINES: I bought a lot of lumber from McElwee & Carney during Mr. Carney's absence, giving them my notes for it. Carney has just returned and says that they have too much of my paper, and wishes to return the notes and cancel the sale, unless I can give him other paper as security. This I can not conveniently do just now. As I have relied on this lumber for spring trade, I want you to help me out by indorsing the notes, or guaranteeing same, so that I can get the lumber. This I feel will be satisfactory to Mr. Carney, and you will be amply safe in doing so, as I always pay my paper promptly, and as I hold your note for \$15,000 and interest, though not due until May 1, 1895, and as I talked with you considering how it is made out, I can not make use of it. When I have helped you,

VOL. 69.] Hines v. Union National Bank of Chicago.

surely you ought to try and return the favor. I will rely upon your doing so. I will be easier soon, as trade will be better, and I intend to crowd sales. Come down to-morrow and let me know if you will do so.

Very truly yours,

S. B. BARKER."

"CHICAGO, March 22, 1893.

Messrs. McElwee & Carney, City.

GENTLEMEN: I am in receipt of a letter from S. B. Barker requesting me to indorse or guarantee some notes which Mr. Barker owes you for lumber purchased by him from you. I do not care to place my name on paper which is to be put in circulation, but, as you know. Mr. Barker holds my non-negotiable promissory note for \$15,000, with interest at seven per cent, and which matures May 1, 1895, at which time there will be due thereon about \$18,000. I have told Mr. Barker, while I will not indorse his paper, I will guarantee the same to the amount which will be due on my notes, which he holds, when the same becomes due, provided that if Mr. Barker fails to pay the notes which he gives to you, I shall be given time on my liability until my note to him matures. If you care to accept his notes with my guarantee upon the above condition you can do so and hold this letter as evidence of my obligation.

Very truly yours,

EDWARD HINES."

The disputed facts in the case are but few, and upon the determination of two predominant ones, and the legal effect thereof, the entire case hinges.

The first one is, when, in point of time, did the bank acquire the \$15,000 note made by Hines, and the stock certificates pledged as collateral thereto; and, as a legal consequence, what effect did such acquiring have upon the purported guaranty by Hines to McElwee & Carney?

The bank contends that the note was in its possession, and for a valuable consideration, before March 22, 1893, which was the date on which the alleged guaranty by Hines to McElwee & Carney purports to have been made.

Hines v. Union National Bank of Chicago.

The decree found that the note and stock came to the hands of the bank "as early as two or three days prior to May 29, 1893."

Such conclusion of the chancellor, so embodied in the decree, was reached upon a consideration of a good deal of conflicting evidence, which, as we look at the case, need not be reviewed by us. Even if it be not correct, and that, as claimed by the bank, the note and stock collateral came to the hands of the bank before the purported contract of guaranty was made by Hines to McElwee & Carney, it is plainly established that Hines had no notice of such transfer until long afterward—whichever may be the true date of such transfer—and not until after he had acquired the notes given by Barker to McElwee & Carney.

While there was nothing in the mere fact that the \$15,000 note was made by its terms "non-negotiable," which would prevent the payee thereof from assigning the note so as to vest in the assignee the right to sue upon it in his, or its, own name, yet such note, when assigned, remained subject to all the equities existing between the maker and the payee at the making thereof, and which might subsequently arise between them up to, at least, the time when the maker acquired notice of its assignment. The non-negotiable words written across the face of the note charged the bank, as assignee thereof, with notice of every fact which inquiry of Hines, as maker, would have revealed.

It will not be questioned that had Barker continued to own the note at the time of its maturity, and had sued Hines upon it, the latter might have set off against Barker whatever equities existed in his, Hines', favor, and especially the equity in Hines' favor growing out of his purported guaranty of Barker's notes to McElwee & Carney.

And so we regard it as being beyond question that the bank, as assignee of the note would not, until at least notice of the assignment was given to Hines, occupy a better position as against such equities than Barker would have held, had he continued to hold the note. *Prins v. South*

VOL. 69.] Hines v. Union National Bank of Chicago.

Branch Lumber Co., 20 Ill. App. 236; Weber v. Rosenheim, 37 Ill. App. 72; Goldman v. Blum, 58 Tex. 630; 1 Daniel on Negotiable Instruments (2d Ed.), Sec. 742; Secs. 3, 4, 5 and 6; Chap. 98, entitled Negotiable Instruments, Rev. Stat., Ill.

We, therefore, regard it as being immaterial whether the note was assigned to the bank before or after the making of the guaranty, no notice of the assignment having been given to Hines until after his equity arose under his purported guaranty to McElwee & Carney.

The second question of fact of importance in the case, is whether or not Hines made the guaranty referred to.

The bank claims that the purported contract of guaranty by Hines to McElwee & Carney was fictitious, and was manufactured for the purpose of defeating the claim of the bank, long after Barker's failure, and after Hines knew that the note had been assigned to the bank.

Upon that question, the chancellor found in favor of the bank, and that the guaranty contract was fictitious and fraudulent.

The decree in that respect was as follows:

"The court further finds that said Barker did not on or about March 21, 1893, request said complainant, Edward Hines, to guarantee the payment of notes which said Barker had given to McElwee & Carney, nor did Barker then write the letter of that date addressed to said Hines, which is set out in the bill of complaint, nor did said Hines on or about March 22, 1893, execute and deliver to said McElwee & Carney his guaranty in writing; but that both of said documents were executed long after their apparent date and after the failure of said Samuel B. Barker; that said documents were not genuine instruments written or executed in the course of the transactions to which they purported to refer, but were executed by the complainant for the fraudulent purpose of creating evidence of an apparent defense to the note of \$15,000, above referred to; that no genuine guaranty of the notes of said Barker held by McElwee & Carney was ever given by said Edward Hines or received or acted upon by said McElwee & Carney."

Hines v. Union National Bank of Chicago.

Perhaps it is not necessary to consider whether such findings are sustainable under the evidence, in view of the fact that Hines had no notice of the assignment to the bank until after he acquired and became the owner of the notes given by Barker to McElwee & Carney, for becoming such holder and owner, he would be entitled to a set-off to their extent against the non-negotiable note held by the bank, irrespective of whether he gave the purported guaranty or not.

But we think the findings of the decree that the guaranty contract was a cooked up device, is not sustained by the evidence. The evidence upon which the court relied as its basis for such findings was mainly the testimony of Barker that both of the copied letters were prepared and written after the suit at law upon the \$15,000 note was begun, and the appearance of the letter book in which the letter dated March 22, 1893, was copied.

The testimony of Barker was, in our opinion, greatly overborne by the testimony of Hines and Carney, and the circumstances of the lumber transaction to which reference in the letter is made. There can be no doubt from the evidence that Barker's financial circumstances when the lumber purchase was made, and of which Carney knew before the lumber was delivered, were such as to make it a very imprudent business operation to trust him to the extent of \$21,000 without some security, and it appears plainly enough that Carney, who was away when his partner made the sale to Barker objected to the sale as soon as he returned, and refused to consent to a delivery of the lumber except upon some security being given, and so told Barker.

It is claimed that the letter-press copy of the guaranty letter of March 22, 1893, from Hines to McElwee & Carney, which appears in the letter book certified to us in the bill of exceptions, presents very strong evidences of having been inserted at a much later day than its purported date.

Those evidences are, mainly, a discoloration of the paper upon which the copy is impressed, and the fact that it seems to be crowded into a page upon which another letter of the same date was copied.

VOL. 69.] Hines v. Union National Bank of Chicago.

We do not consider the discoloration of the paper as indicating much of consequence. It might have occurred from a variety of causes which are known to all men, whether scientifically educated or not. And besides, the discoloration does not appear to be confined to that sheet or page alone when the whole book is looked at.

It is not infrequent in the book that two letters are copied on the same page, although the letter in question is more crowded in space on the page, and in spacing between the lines (typewritten), and is more distinct in the impression than most of the other letters. But upon such evidence we can not convict men of unimpeached business repute of what is but little less than forgery.

It is contended by the appellee that because Hines had, before the hearing, paid to McElwee & Carney only \$1,000 on account of his guaranty to them, his right to a set-off against the bank is limited to that amount. Admitting that under some circumstances such might be the case, it can not be so here.

The contract of guaranty, by its terms, was to the extent that should be due on the \$15,000 note at its maturity, provided that Barker should fail to pay his notes held by McElwee & Carney.

It was proved that after Barker's failure, and about a year before his notes matured, McElwee & Carney were required by their bankers, who had discounted them or held them as collateral, to take them up, and when they did so, they indorsed and delivered four of the notes, aggregating about \$16,500, principal, to Hines, but without releasing him from his guaranty. In other words, McElwee & Carney indorsed the notes without recourse, and surrendered them to Hines, but still held him liable to them on his separate guaranty. McElwee & Carney could no longer look to Barker, who was absolutely worthless, financially, but for Barker's obligation Hines was substituted, by virtue of his guaranty contract from which he was never discharged; and we think it was immaterial that Hines had not yet discharged his guaranty. He was still liable on his contract of

Liebold v. Green.

guaranty, and it was against that liability that the \$15,000 note was security, and for the amount thereof he was entitled to a set-off.

A decree in accordance with the prayer of the original bill filed by Hines should have been given, and the cross-bill of the bank should have been dismissed. The decree is therefore reversed, with directions to the Superior Court to enter a decree to that effect.

This disposes of the appeal from the order denying leave to file a bill to review the decree, and such appeal is, therefore, dismissed.

The affidavit of Barker and the affidavits in reply thereto, filed in this court for the first time, have no proper place in the record, and they are accordingly ordered to be stricken from the files.

First case reversed, with directions, and in the second case appeal dismissed.

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Michael Liebold v. O. B. Green.

1. **LIMITATIONS—*The Statute Can Not be Pleaded to Additional Counts Stating Same Cause of Action.***—Liability for torts is joint and several, and the discontinuance of a suit as to one defendant, and the filing of additional counts against the remaining defendant, is not the presentation of a new cause of action, however much the story of the circumstances of the alleged tort may vary, and a plea of the statute of limitations, as to such counts, can not be sustained where the original declaration was filed in proper time.

2. **PARTNERSHIP—*Persons Taking Steps to Form Corporation.***—Persons who, after taking steps to form a corporation, fail to complete the organization thereof, but proceed with the business for which the corporation was proposed to be organized, are partners, and are liable as such.

3. **SAME—*Liability of Partners.***—Each partner is liable individually for all torts committed in the course of the partnership business, and may be sued alone, or with part or all of the other partners.

4. **SURPLUSAGE—*Need Not be Proved—Defined.***—Surplusage in a declaration need not be proved; and whatever may be stricken out without destroying the right of action is surplusage.

VOL. 69.]Liebold v. Green.

5. NEGLIGENCE—*Liability of Person Inviting Another into Danger.*—If one invite another into danger, of which the former ought to be aware, and of which the latter is ignorant and is under no obligation to inquire, and injury follows, the one giving the invitation is liable.

6. PLEADING—*When Connection of Party Charged with Liability, with Others as Partners, Need Not be Pleaded.*—In pleadings charging a party with liability either *ex contractu* or *ex delicto*, it is not necessary to allude to any connection or association he may have had with any body as a partner, unless in some action between themselves. Whether the liability charged grows out of a personal act, or the act of another, which in law is the act of the defendant, is usually a matter of evidence, and need not be noticed in pleading.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 15, 1897.

JAMES C. McSHANE, attorney for plaintiff in error.

DAVID FALES, attorney for defendant in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

May 6, 1892, in the Circuit Court, the appellant filed a declaration as follows:

"For that whereas, the plaintiff, heretofore, on the 16th day of December, A. D. 1891, was in the employ of Isaac S. McGowan, one of the defendants who had contracted to move the house of the other defendant, O. B. Green, and being so employed it was the duty of the said defendants to afford him proper means and conveniences to safely pursue his employment, and not to subject him to risks not necessarily incident to the business; yet the defendants, notwithstanding their duty in this behalf, did negligently direct him on, to wit, the 16th day of December, A. D. 1891, at, to wit, the corner of Franklin and Harrison streets in the city of Chicago and county and State aforesaid, to take and haul upon an ordinary dray wagon a foundation for a pile-driver, together with an engine house, and remove the same to another place. And that the defendants assured him that there was no danger of an injury in obeying their

Liebold v. Green.

instructions. That the plaintiff relying upon said assurances, and at the request of said defendants, and exercising due care and diligence, hauled and removed the said foundation for a pile-driver, and the said engine house upon the said wagon. That in hauling the same, and while in the exercise of due care at, to wit, the corner of Franklin and Van Buren streets, the plaintiff, by the breaking apart of the house, and while attempting to escape, was thrown to the ground, by means whereof the plaintiff was greatly cut, bruised and wounded, and his arm crushed, and he became sick, sore and disordered, and so remained for a long space of time, to wit, from thence hitherto, during all of which time he, the plaintiff, has thereby suffered great pain, and has been prevented from attending to and transacting his affairs and business, and has also by means of the premises been obliged to lay out large sums of money, to wit, four hundred dollars, in and about endeavoring to be healed of the said wounds, sickness and disorder. And that the aforesaid injury will, he believes, deprive him permanently of the use of one of his arms, to the damage of ten thousand dollars, and therefore he brings his suit," etc.

Thereafter he discontinued the suit as to McGowan, and more than two years after the injury of which he complained, filed additional counts, of which the following is a sample:

"For that, whereas, the plaintiff alleges that prior to and on, to wit, the 16th day of December, 1891, the defendant, O. B. Green, and others as copartners, doing business under the name of Green's Dredging Company, was possessed of a pile-driver and an engine house attached to the same, which they desired to move from the vicinity of Harrison street and the Chicago river, to the vicinity of Plymouth Place and 12th street in the city of Chicago. And the plaintiff further alleges that one Isaac S. McGowan was at the time and place aforesaid in the heavy teaming business, and the plaintiff was then and there a teamster in the employ of the said McGowan, and as such teamster earned a large sum of money, to wit, twelve dollars per week.

And the plaintiff further alleges that the defendant, Green, and his copartners, under the name and style aforesaid, contracted with the said McGowan for the said McGowan to furnish a wagon, horses and a teamster to move the said pile-driver and engine house attached to the same, and that they, the said Green and his copartners, were to load and unload said pile-driver and engine house on and off of said wagon; and the plaintiff alleges that the said McGowan, in pursuance of said contract, then and there ordered and directed the plaintiff to take certain of his, the said McGowan's, horses and a certain wagon, and under the direction of said Green and his copartners, through their superintendent in that behalf, to haul said pile-driver and engine house to the said place to which it was to be moved as aforesaid.

And the plaintiff further alleges that he did undertake the said work as the teamster of the said McGowan, under the direction of the superintendent, a certain servant employed by and representing the said Green and his copartners in that behalf; and the plaintiff alleges that the said Green and his copartners, through their said servant and representative in charge of said work, loaded the foundation of the said pile-driver and said engine house attached to the same upon the said wagon for the purpose of being moved as aforesaid; and the plaintiff alleges that he had nothing to do with the loading of said foundation and engine house onto said wagon, and that by reason of the condition of the streets over which it was necessary to drive said wagon in moving said foundation of said pile-driver and engine house, and by reason of the old and dilapidated condition of the said engine house, the said engine house was likely to fall down while being so moved unless it should be properly braced and propped up, which fact was well known to the servant and representative of the said Green and his copartners in charge of the said work, or would have been known to him had he exercised proper care in that behalf, but which fact was unknown to the plaintiff.

The plaintiff further alleges that by reason thereof it

Liebold v. Green.

then and there became and was the duty of the said Green and his copartners, through their said servant and representative in that behalf, to cause said engine house to be so braced and propped that it would not fall down while being moved as aforesaid, but the plaintiff alleges that the defendant and his copartners through their said servant and representative, not regarding their said duty, wrongfully, negligently and improperly failed and neglected to cause said engine house to be so braced and propped as aforesaid, but through their said servant and representative, wrongfully, negligently and carelessly ordered and directed the plaintiff to get onto the said wagon and haul the said foundation and engine house in its then condition; and the plaintiff alleges that he did, in pursuance to the said order and direction of the said Green and his copartners, through their said servant and representative in that behalf, get onto said wagon and drive the same, and that while driving the same, and as a result of the failure upon the part of the said Green's and his copartner's said servant to brace and prop the said engine house as aforesaid, and while as plaintiff alleges, he, the plaintiff, was in the exercise of ordinary care and caution for his own safety, and while driving along Franklin street, in moving said foundation and engine house between the said points, the said engine house fell down, and the plaintiff was thereby knocked or fell from the said wagon, or jumped to keep said engine house from falling on him, and fell under one of the wheels of the said wagon," etc., stating injury as in the first count.

To these counts the appellee pleaded the statute of limitations, to which the Circuit Court rightly sustained a demurrer. The original count was for injury sustained by the negligence of the appellee and McGowan. Whether there was any cause of action against McGowan or not, we need not consider, as liability for torts being joint and several, the discontinuance as to him was without effect upon the right of the appellant to pursue the appellee. Such pursuit of him alone, for the same injury resulting from his negligence, either with or without concurring negligence of

McGowan, was not the presentation of a new cause of action against the appellant, but only a different version of the same transaction; however much the story as to the circumstances of the negligence might vary. Illinois Steel Co. v. Eylufeldt, 62 Ill. App. 552; affirmed in 165 Ill. 185; Ellison v. Georgia R. R., 87 Ga. 691.

The reference in the additional counts to "others as copartners" is mere surplusage.

Probably no case can be mentioned where, in pleadings governed by the common law, charging a defendant with liability either *ex contractu* or *ex delicto*, it is necessary to allude to any connection or association he may have had with anybody as a partner, unless in some action between themselves. Whether the liability charged grows out of a personal act, or the act of another, which in law is the act of the defendant, is usually a matter of evidence, not necessary to be noticed in pleading. 1 Ch. Pl. 207, Ed. 1828.

On the trial the appellant testified, and was not disputed, that he drove a team of four horses for McGowan, who sent him to report to a Mr. Dorr and do as he said; that under Dorr's directions the foundation of a pile-driver, with an engine house upon it, was loaded upon a wagon by men obeying the orders of Dorr; and the horses hitched to the wagon. It fairly appears that in driving four horses it was necessary for the appellant to be in the engine house, and that it shook so much while being hauled that the appellant, being afraid of it, got off from the wagon and asked Dorr if he had a man that could drive the leader team, and the appellant would drive the wheel team.

It is apparent that the purpose of the appellant was to walk instead of riding in the house.

Dorr told him: "You teamsters are always kicking; that building is perfectly safe; you go in there. It can't fall; there might be a board or so shake off."

The appellant obeyed; the building caved in; the appellant was covered up with boards and rolled out, and his arm broken under a wheel of the wagon.

The appellee owns most of the stock of "Green's Dredg-

Liebold v. Green.

ing Company," to incorporate which steps were begun but never completed, so that the parties interested in it are partners. Loverin v. McLaughlin, 161 Ill. 417.

As such each partner is individually liable for all torts committed in the course of the partnership business, and may be sued alone, or with part or all of the other partners. Wis. Cen. R. R. v. Ross, 142 Ill. 9.

Dorr is also a partner and superintendent of the company under control of the appellee.

The pile-driver and engine house belonged to the company which contracted with McGowan to haul the pile-driver, but upon what terms the case does not show, nor did the appellant attempt to prove the terms. Surplusage in a declaration need not be proved; and whatever may be stricken out without destroying the right of action is surplusage. 1 Greenl. Ev., Sec. 51.

Everything in the declaration on the subject of the contract between Dorr and McGowan may be stricken out without touching the case of the appellant.

His right of action is because, under circumstances which made it the duty of the appellant to be governed by the directions of Dorr, he was injured as the result of obedience to orders which Dorr negligently gave.

Whether it was negligence in Dorr to give the orders—that is, whether in the exercise of such skill as the superintendent of the working of such a plant ought to possess, he carelessly exposed the appellant to peril which his ignorance did not permit him to appreciate, were questions for the jury.

The appellant might be afraid, and yet upon the assurance of one whom he believed to possess knowledge that he had not, his fears might be dispelled; and acting upon that state of mind his conduct might be without fault on his part.

If one invite another into danger of which the former ought to be aware, and of which the latter is ignorant, and is under no duty to inquire, and injury follows, responsibility follows. Fisher v. Jansen, 30 Ill. App. 91; Elliott v. Hall, 15 Law Rep., Q. B. Div. 315.

Both counts herein copied allege care by the appellant, so

that what is copied in the brief of the appellee as to the necessity of such allegation, from page 368 of Calumet Iron and Steel Co. v. Martin, 115 Ill. 358, does not seem pertinent here. Nor can what is so copied be accepted as the law. It is only *dictum* there, and is opposed to the express decisions in Bass v. C., B. & Q. R. R., 28 Ill. 9, and Cox v. Brackett, 41 Ill. 222, in both of which cases the point was before the court and decided; in the first by necessary implication, and in the latter in express words.

There is a great waste of the English language in the declaration of the appellant, and still he is entitled to a trial by jury on the allegations therein which are material, though he should not prove those that are immaterial.

The peremptory instruction by the court to the jury to render a verdict for the appellee was error, and the judgment is reversed and the cause remanded.

MR. JUSTICE WATERMAN.

I am of the opinion that a question of fact for the jury was presented by the evidence that defendant assumed to superintend the moving and gave directions which plaintiff followed, and was, in consequence, injured. It did not appear beyond question that defendant had surrendered the task of moving the property to an independent contractor, over whom he exercised no control. Wharton on Negligence, Sec. 182; Schwartz v. Gilmore, 45 Ill. 455; Chicago v. Joney, 60 Ill. 383.

MR. PRESIDING JUSTICE SHEPARD, dissenting.

For the purposes of this opinion I assume that if the plaintiff, here and below, is entitled to recover, the defendant is responsible.

He was the principal owner in Green's Dredging Company, which, being unincorporated, was a partnership—Loverin v. McLaughlin, 161 Ill. 417—and each partner liable for all torts committed in the course of the partnership business—Wis. Cent. R. R. v. Ross, 142 Ill. 9—and George J. Dorr was also a partner and superintendent of the business of the company.

Wright v. Case.

The plaintiff drove a team for Michael McGowan, with whom Dorr contracted to haul a pile-driver from one part of the city to another.

The foundation of the pile-driver, with an engine house attached, was loaded, under Dorr's direction, upon a wagon drawn by four horses. The engine house was at the front, and the plaintiff stood inside it to drive. On the road the house shook so much as to alarm the plaintiff, and he got out and asked Dorr if he had a man that could drive the leader team, and he, plaintiff, would drive the wheel team; that he was afraid of the building; to which Dorr replied that the building was perfectly safe and could not fall, and told the plaintiff to go in again. He went in, and further on the house came to pieces and the plaintiff was seriously and permanently injured.

This suit is for negligence, on the theory that the plaintiff had no skill to enable him to determine whether the building was safe, and that Dorr had, or ought to have had such skill, did know, or ought to have known, that the plaintiff was in danger by being in the building while it was being hauled.

The plaintiff was not in the service of the defendant, was not bound to obey orders of Dorr.

No relations between these parties imposed any duty upon the defendant toward the plaintiff. Had Dorr, knowing the danger, induced the plaintiff ignorantly to expose himself to it, a question might arise in a controversy between them which is not before us.

The judgment should be affirmed.

Esther Fidelia Wright v. George J. Case et al.

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1. **APPEALS—Lie from Refusal to Appoint Receiver, After Sale, in Foreclosure Suit.**--An appeal will lie from an order refusing to appoint a receiver of the rents of mortgaged property, after a sale under foreclosure and the approval of a master's report showing a deficiency.

2. MORTGAGES—*Provision for Appointment of Receiver Should be Enforced.*—Where the terms of a mortgage expressly give the mortgagee the right to have a receiver appointed to collect rents after a sale is had and a deficiency judicially ascertained, it is error to refuse to appoint a receiver when the conditions stated have arisen. The contract of the parties as to remedies should be followed.

Bill to Foreclose Mortgage.—Appeal from the Circuit Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded with directions. Opinion filed March 15, 1897.

STILLMAN & MARTYN, attorneys for appellant.

CUTTING, CASTLE & WILLIAMS, attorneys for appellees, August F. Kreft, Guardian, et al.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order refusing to appoint a receiver of the rents of mortgaged property, after a sale under foreclosure, the proceeds of which sale were insufficient to satisfy the decree. The mortgagors sold the property, before the foreclosure suit was instituted, to one who assumed the payment of the mortgage, but died, and of whose estate there is shown neither executor nor administrator.

The mortgagors were served only by publication, and thus there is no party against whom a decree for the deficiency can be made; but the master's report of the sale, showing the deficiency, has been confirmed by the court, so that the fact of the deficiency is judicially established.

The mortgage contains ample provisions for the appointment of a receiver, either before a decree or after a sale leaving a deficiency.

We have been referred to no authority holding under an appellate system like our own, that an order refusing to appoint a receiver is appealable. The general rule is that appeals lie only from final orders; and orders granting, refusing or dissolving injunctions; and orders appointing or discharging receivers, in the absence of statutory provisions,

Wright v. Case.

are usually not appealable. High on Inj., Ch. 33; High on Rec., Sec. 25 *et seq.*

But in *Titus v. Mabee*, 25 Ill. 257, and in many cases following it, it has been held that where the only relief sought was an injunction, the dissolution of the injunction would be treated as a final order and appealable. And analogous cases at law—though the question was not raised—are *Hecht v. Feldman*, 54 Ill. App. 144, and *Page v. Dillon*, 61 Ill. App. 282, where this court entertained appeals from judgments disposing of the attachment part of a suit, while the suit upon the merits remained pending in the lower court. In the first of those cases the Supreme Court also did as we did, except that it reversed our judgment upon the law of the point at issue—153 Ill. 390. In this the Supreme Court and this court departed from the general rule. 2 Ency. Pl. & Pr. 118.

Now here the suit is at an end. The application for a receiver is to obtain the fruits, as is an application for a writ of assistance which has often been the subject of appeals. *Lambert v. Livingston*, 131 Ill. 161.

The grounds upon which a receiver was denied appear to be only sentimental.

Part of the heirs of the purchaser from the mortgagors are infants, with no other income than the rents of this property; it is alleged that the sale under the decree was for only two-thirds of the value of the property, and that the purchaser is a trustee for the mortgagee.

Under the terms of the mortgage the right of the appellant, as mortgagee, to the rent was fixed and clear. The contract of the parties is to be followed as to remedies. *Nicholls v. Peninsular Stove Co.*, 48 Ill. App. 317.

No other remedy is available to the appellant, as to the deficiency than a receiver of the rents. If the property is worth more than it sold for, it may be redeemed; and if the poverty of the owners of the equity of redemption should prevent them from redeeming, that—paraphrasing what is said in *Hecht v. Feldman*, 153 Ill. 390, as to the ability of the debtor to give a forthcoming bond—is their misfortune,

but does not entitle them to any treatment different from that which the law accords alike to all mortgagors under like contracts.

The order is reversed and the cause remanded, with directions to grant the application of the appellant for a receiver of the rents, to be applied to the satisfaction of the deficiency.

Reversed and remanded with directions.

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114 1417

Nicholas Goergen v. Kaspar G. Schmidt.

1. JUDGMENTS BY CONFESSION—*When Not Interfered With*.—A motion to set aside a judgment by confession, entered in term time in open court, is an appeal to the equitable powers of the court, and unless it is made to appear that there are equitable reasons for setting aside such judgment, it will be allowed to stand.

2. LANDLORD AND TENANT—*Assignment of Lease Does Not Release Lessee nor Entitle him to Notice of Default by Assignee*.—The assignment of a lease by a tenant with the written assent of the lessor, does not absolve the tenant from any of the covenants of the lease, nor does it give him a right to notice of default on the part of the assignee in the payment of rent.

Motion, to vacate judgment by confession. Error to the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 15, 1897.

ARNOLD TRIPP, attorney for plaintiff in error.

WINSTON & MEAGHER, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error brought to reverse the action of the Superior Court in entering judgment by confession, in term time, in open court, against the plaintiff in error, and in refusing to set the same aside upon his motion.

Goergen v. Schmidt.

A motion to set aside a judgment by confession entered in term time, in open court, is an appeal to the equitable powers of the court, and unless it is made to appear that there are equitable reasons for setting aside such judgment, it will be allowed to stand. Mumford v. Tolman, 157 Ill. 258; Packer v. Roberts, 140 Ill. 9; Hansen et al. v. Schlesinger et al., 125 Ill. 230; Colson v. Litch, 110 Ill. 504; Hier et al. v. Kaufman, 134 Ill. 215, 225.

The plaintiff in error was the lessee of certain premises, the lease containing a power of attorney to confess judgment for rent due, with \$20 attorney's fees. Plaintiff in error assigned the lease by the following instrument:

“For value received, I hereby assign all my right, title and interest in and to the within lease unto Adam R. Brand, heirs and assigns, and in condition of the consent to this assignment by the lessor I guarantee the performance by said Adam B. Brand of all the covenants on the part of the second party in said lease mentioned.

In consideration of the above assignment and the written consent of the party of the first part thereto, I hereby assume and agree to make all the payments and perform all the covenants of the within lease by said party of the second part to be made and performed.

Witness my hand and seal this 15th day of July, 1895.

NICHOLAS GOERGEN. [SEAL.]”

By such assignment the lessee was not absolved from any of the covenants of the lease, nor did he acquire a right to notice of default on the part of Brand, the assignee, in the payment of rent. Grommes v. St. Paul Trust Co. et al., 147 Ill. 634.

No equitable reason for setting aside the judgment was shown.

The judgment entered was within the power of attorney, and was only for the rent earned and due upon the day of the entry of the judgment. Scott v. Mantonya, 60 Ill. App. 481; Fortune v. Bartholomei, 62 Ill. App. 290, 164 Ill. 51.

The court properly entered the judgment, and rightly

refused to set the same aside or to admit the defendant below to plead and offer a defense upon merits which it was not made to appear there was reason to think existed.

The judgment and order of the Superior Court is affirmed.

MR. JUSTICE GARY.

The doctrine of the line of cases of which *Frye v. Jones*, 78 Ill. 627, approved in *Campbell v. Goddard*, 117 Ill. 251, is an example, must be considered abandoned, though not expressly rejected, by the cases cited by Judge Waterman.

69 540
172s 109

Wallace C. Clark v. A. J. Burke et al.

1. **APPELLATE COURT PRACTICE—*Absence of a Bill of Exceptions.***—When there is no bill of exceptions in the record the court can not review the findings of the court below.

Voluntary Assignment.—Error to the County Court of Cook County; the Hon. ORREN N. CARTER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 15, 1897.

TRUMBULL & HORNER and FRANCIS M. LOWE, attorneys for plaintiff in error.

HENRY A. HICKMAN, attorney for defendants in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was appointed assignee of the Southern Hotel Company, a corporation, by an order of the County Court, made July 24, 1894, in the place of a previous assignee who resigned and who had been authorized to continue the business of said corporation.

The order appointing plaintiff in error, recited among other things, as follows:

“And Wallace C. Clark having appeared in open court,

Clark v. Burke.

and having agreed to administer the said estate as assignee, and also having agreed to assume and pay all liabilities incurred by the said Brodie B. Davis, as such assignee, and to make good to said estate my loss which may result to said estate from the further operation by the said Wallace C. Clark of the business of said insolvent, and having further agreed to render all services which may be required of him as such assignee without fees, and the said Brodie B. Davis having tendered his resignation as such assignee, and the same having been accepted by the court, it is therefore ordered that the said Wallace C. Clark be and is hereby appointed assignee of the said Southern Hotel Company in the place and stead of said Brodie B. Davis."

On October 15, 1894, plaintiff in error, as assignee, was ordered to discontinue and close up the business of the corporation, and on December 11th, following, the defendants in error, creditors of the estate, filed their petition setting up that certain moneys and assets had come to his hands which he had wasted, etc., and upon a hearing upon such petition and his answer thereto, the County Court made an order on March 9, 1895, finding that he had received in cash \$759.17 from accounts that accrued before the date of his appointment; that there came into his possession accounts secured by baggage amounting to \$282.54, and certain provisions and other property, specifying the same and their separate value, which, together with said cash and accounts, aggregated \$1,433.71. The order also found that certain additional property not covered by a mortgage held by the wife of plaintiff in error, came to his hands and was sold by him under the direction of the court, for which he has never reported or accounted.

It was further found that plaintiff in error had not conducted his trust with fidelity and "has neglected and in every way refused to look after the interests of said creditors;" that he conducted the business for the benefit of his wife, who was a mortgage creditor of the estate, "and at no time has he considered the interest of said creditors; that said estate has been wasted, and the above property referred

VOL. 69.]

Walker v. Wood.

to, neglected and misused," and has been used and mixed with the mortgaged property and wasted.

By the same order, plaintiff in error was directed to pay the claims of defendants in error, Burke et al., who were found to be labor claimants, to the number of twenty-nine, aggregating \$1,079.72, and certain other claims, which, with the above, amounted to \$1,437.04.

This writ is prosecuted only from the order of March 9, 1895.

It is contended that the order was unjust and erroneous in that it required plaintiff in error to pay more than the \$759.17 cash found to have come to his hands.

While it would have been more regular to have required the plaintiff in error to file an account and report of his doings, and therefrom to have adjudicated specifically upon the sums with which he was chargeable, it was his right to have submitted such an account and report in answer to the petition that was filed against him by the said defendants in error. Instead, however, of doing so, he contented himself with filing an answer that amounted to but little more than a denial of the fraudulent conduct with which the petition charged him, and contained nothing specific as to the funds and property which he was charged with having received and not accounted for and wasted.

There is no bill of exceptions in the record, and we are therefore unable, if we were asked to do so, to review the correctness of the findings either as to the amounts ordered to be paid to the defendants in error, or as to whether the plaintiff in error had wasted the estate.

Under the record before us the plaintiff in error is in no condition to complain of the order brought up by this writ.

The order of the County Court is, accordingly, affirmed.

69 542
170s 463

James H. Walker et al. v. William Wood et al.

1. PARTNERSHIPS—*Limited and General.*—The court holds that the statute under which limited partnerships may be formed, has not been complied with in this case, and that where that is not done the partnership is general.

Walker v. Wood.

2. NOVATION—*Essential Requisites.*—A novation can not exist without a previous valid obligation, agreement of all the parties to a new obligation, the extinguishment of the old and the validity of the new obligation. *Hayward v. Burke*, 151 Ill. 121.

Assumpsit, goods sold and delivered, etc. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 15, 1897.

WILLIAM R. ODELL, attorney for appellants.

PARTRIDGE & PARTRIDGE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
What this case is, is most easily shown by copying from the abstract as follows:

“ Plaintiff gave in evidence stipulation of facts as follows:

State of Illinois, } ss. In the Superior Court of Cook
County of Cook. } County.

William Wood et al., }
v. }
James H. Walker, Wm. B. Howard } ss. Gen. No 154,320.
and Columbus R. Cummings, as }
James H. Walker & Co. }

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, for the purpose of the trial of said cause in said court, that upon the trial of said cause the following facts are admitted and agreed by the respective parties, provided, however, that other proofs as to any fact or matter involved in said suit, not inconsistent with the statements contained in this stipulation, may be introduced by either of the parties upon the trial of said cause.

Said defendants, on the 27th day of December, 1892, were engaged in the dry goods business under the firm name of James H. Walker & Co., and said firm was indebted to plaintiffs for goods sold and delivered to the said firm in the amount of one thousand two hundred thirty-nine dollars

VOL. 69.]Walker v. Wood.

and ninety-eight cents (\$1,239.98). This amount does not include amount of the payment of June 17, 1893.

On or about said December 27, 1892, the corporation, which had previously been organized under the laws of the State of Illinois, under the name of James H. Walker Company, purchased the business and assets of said firm, and assumed the payment of the outstanding liabilities of said firm, including the amount of the plaintiffs' claim herein.

Said corporation proceeded to carry on the said dry goods business, and on or about January 20, 1893, caused a notice to be sent to the plaintiffs, which was received by the plaintiffs at that time, and which was to the effect that the assets and business of said firm had been acquired by said corporation and that said corporation had assumed the outstanding liabilities of said firm. Among these liabilities was the present claim of the plaintiffs herein.

On or about the 4th of August, 1893, said corporation became insolvent, and the Chicago Title and Trust Company was appointed receiver of the assets of said corporation by the Circuit Court of Cook County. The amount of the plaintiffs' claim was proved as a claim against said corporation before said receiver, on the ground that the amount of said claim has been assumed by said corporation, and dividends to the aggregate amount of eight hundred ninety-two seventy nine one hundredths dollars (\$892.79) were thereafter paid on said claim by said receiver to the plaintiffs.

It is agreed that this stipulation is for the purposes of the trial of the above entitled cause alone, and that the matters and things therein contained are not admitted for the purpose of any other trial or litigation whatsoever.

Dated this 23d day of October, A. D. 1896.

PARTRIDGE & PARTRIDGE,

Attorneys for Plaintiff.

WILLITS, CASE & ODELL,

Attorneys for Defendants.

And thereupon defendants gave in evidence:

Articles of partnership, stating that James H. Walker, Columbus R. Cummings and William B. Howard, all of

Walker v. Wood.

Chicago, for the purpose of forming a limited partnership, etc., certify that name is to be James H. Walker & Co., the nature of the business to be carried on is wholesale dealers and jobbers of dry goods; that James H. Walker is general partner and Cummings and Howard special partners; that Cummings has contributed property of cash value of \$616,550, and Howard has contributed property of cash value of \$493,450; that the partnership is to commence February 1, 1892, and terminate January 30, 1895; that partnership shall not be dissolved by death of partners, etc.

(Signed) JAMES H. WALKER, [SEAL.]

COLUMBUS R. CUMMINGS, [SEAL.]

By OTHO S. GAITHER,

His attorney in fact.

WILLIAM B. HOWARD.

Acknowledged as follows:

State of Illinois, }
County of Cook. } ss. I, Frank E. Hayner, a notary public in and for said county in the State aforesaid, do hereby certify that James H. Walker and William B. Howard, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free act and deed, for the uses and purposes therein set forth, and that Otho S. Gaither, attorney in fact for Columbus R. Cummings, personally known to me to be the same person whose name as such attorney in fact is subscribed to the foregoing instrument, appeared before me this day in person and then and there acknowledged that he signed, sealed and delivered the said instrument as such attorney in fact for and on behalf of his said principal, as his free and voluntary act, for the uses and purposes therein expressed.

Given under my hand and notarial seal this first (1st) day of February, A. D. 1892.

FRANK E. HAYNER,
Notary Public.

VOL. 69.]

Walker v. Wood.

Affidavit of Walker' that the property contributed by Cummings and Howard has been contributed actually and in good faith.

State of Illinois, } ss. In the Circuit Court of Cook
County of Cook. } County. In chancery.

Juillard et al.

vs.

James H. Walker & Company et al. }
Defendants.

To the honorable judges of said court, in chancery sitting:

Your petitioners, William Wood, John P. Wood, John McGill and Irwin Shupp, respectfully represent unto the court that they are copartners trading together under the name and style of William Wood & Co.; that they sold goods, wares and merchandise to the partnership of James H. Walker & Co., in the month of December, 1892; a more particular description of which said goods and of the dates of said sales is set out in the statements of the accounts hereto attached as part of the proof of claim; that said partnership of James H. Walker & Co. was, on the 31st day of December, 1892, indebted to said firm trading as William Wood & Co., on account of said goods, wares and merchandise sold and delivered, after allowing to them all just credits, deductions and set-offs, in the sum of twelve hundred thirty-nine and 98-100 (1,239.98) dollars, with interest thereon at the rate of five (5) per cent per annum, from June 1, 1893, until the same shall be paid; and that said defendant in the above entitled cause, James H. Walker Company, a corporation, etc., assumed said debts of said partnership, and agreed to pay the same to petitioners, and that there is now due on account of said demand from said James H. Walker Company, a corporation, to your petitioners, after allowing to said defendant all just credits, deductions and set-offs, the sum of twelve hundred thirty-nine and 98-100 (1,239.98) dollars, with interest thereon from June 1, 1893, at the rate of five (5) per cent per annum until the same is fully paid.

Your petitioners therefore pray that their said claim herein referred to, and the proof of which is hereto attached, be allowed as a claim against the said James H. Walker

Walker v. Wood.

Company, defendant, and that the receiver of said defendant be ordered to pay the same in due course of administration of the estate of said defendant, and for such other and further relief as to the court may seem meet and to equity may appertain.

WILLIAM WOOD,
JOHN P. WOOD,
JOHN MCGILL,
IRWIN SHUPP.

By N. A. PARTRIDGE, their Solicitor.

State of Illinois, } ss. In the Circuit Court of Cook County,
County of Cook. } in chancery sitting.

A. D. Juillard et al. v. James H. Walker et al.

L. A. Carton v. James H. Walker et al.

To Chicago Title and Trust Company, receiver, and to Hon.
Geo. Bass, master in chancery:

State of Pennsylvania, } ss.
County of Philadelphia. } John P. Wood, co-partner
with William Wood, John Mc-
Gill and Irwin Shupp, trading as William Wood & Co.,
being duly sworn, says that the demand of the said claim-
ants, William Wood & Co., in the above entitled cause, is
for goods, wares and merchandise sold and delivered by the
said William Wood & Co. to the said James H. Walker
Company, and that there is due to the plaintiffs from the
defendants, after allowing to them all just credits, deduc-
tions and set-offs, twelve hundred and thirty-nine and 98-
100 dollars. *Jurat.* JNO. P. WOOD.

WILLIAM WOOD & CO.,
Manufacturers,

Office: Twenty-second and Spring Garden Streets.

PHILADELPHIA, Nov. 7, 1893.

JAS. H. WALKER CO.	DR.
Dec. 1, '92. To Mdse. 2 per cent. 60 d., 3/1..	322.38
3, "	" " .. 57.88
30, "	" " .. 1,359.72
	1,739.98
June 17, By cash.....	500.00
	1,239.98

VOL. 69.]

Walker v. Wood.

State of Illinois, } ss. In the Circuit Court of Cook
County of Cook. County.

A. D. Juillard et al. v. James H. Walker Co. et al.

L. A. Carton v. James H. Walker Co. et al.

To Chicago Title and Trust Company, receiver, and to Hon. Geo. Bass, master in chancery:

Commonwealth of Pennsylvania, }
City and County of Philadelphia. John P. Wood, co-partner with William

Wood, John McGill and Irwin Shupp, trading together as William Wood & Co., being duly sworn, says that the demand of the said William Wood & Co. against the above named company, a copy of which is hereto attached, is for goods, wares and merchandise sold and delivered by the said William Wood & Co. to the said James H. Walker Company, and that there is due to the said William Wood & Co. from the said company, after allowing to it all payments, deductions and set offs, the sum of thirteen hundred and fifty-five 72-100 dollars. Defendant further says that the said claimants are residents of said Philadelphia, Pa.

Jurat.

JNO. P. WOOD.

WILLIAM WOOD & CO.,
Manufacturers,

Office: Twenty-second and Spring Garden Streets,
PHILADELPHIA, Nov. 7, 1893.

JAS. H. WALKER CO.	DR.
Feb. 2, '93. To Mdse. 2 per cent 60 d., 3/1..	229.74
June 22, "	10 " " .. 415.92
" 22, "	" " " .. 259.83
July 24, "	" " " .. 255.02
" 24, "	" " " .. 401.93
	1,562.44
Aug. 31. By Mdse.....	206.72
	1,355.72"

On this the court held that Cummings was a general partner with Walker because no authority from Cummings to Gaither to act for Cummings was shown; and also held

Chicago & Grand Trunk Ry. Co. v. Spurney.

that the old firm had not been discharged from the debt by the assumption of it by the corporation, and the subsequent acts of the appellees, in both which holdings we concur.

The case presents important questions, but we sum up our opinion by saying that the statute under which limited partnerships may be formed was not complied with, and unless that is done the partnership is general. *Manhattan Brass Co. v. Allin*, 35 Ill. App. 336; *Adam v. Musson*, 37 Ill. App. 501; and that the evidence is not enough to show a novation by which the firm was discharged. *Hayward v. Burke*, 151 Ill. 121.

The judgment is affirmed.

Chicago & Grand Trunk Ry. Co. v. Frank Spurney.

1. **WITNESS—Party in His Own Behalf—Credibility.**—The law of this State permits the plaintiff to be a witness in his own behalf, but it allows the jury to take the fact of his interest in the event of the suit into consideration for the purpose of affecting his credibility as a witness, and the defendant is entitled to have the jury so instructed.

2. **DAMAGES—Elements of Humiliation and Grief.**—Mere humiliation and grief resulting from the contemplation of a maimed and disfigured body are not elements entering into an ascertainment of the pecuniary damage sustained as the result of negligence.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 15, 1897.

Plaintiff's eighth instruction:

“8. It is not necessary for the plaintiff, nor will the law permit him, to put witnesses upon the stand for the purpose of testifying as to the amount of damages which the jury should award the plaintiff if, under the instructions of the court, they find a verdict in his favor. This is a question solely for the jury to determine from the nature and character of the injuries received, if any, and the extent of

69	549
69	612
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72	88
69	549
85	604
69	549
89	570
69	549
108	67

VOL. 69.] Chicago & Grand Trunk Ry. Co. v. Spurley.

such injuries, and whether they are of a permanent character, and this the jury must determine according to their best judgment from the evidence in the case, and give him such damages as will reasonably compensate him for the injury the evidence shows he has sustained."

RUNNELLS & BURRY, attorneys for appellant.

CASE & HOGAN, attorneys for appellee; Wm. P. BLACK, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover for personal injuries said to have been caused by the negligence of appellant.

Appellee was employed by appellant to work about its grain elevator; his business seems to have been to shovel grain out of cars into a "tank," from whence an elevator took the grain up.

Upon the day of the accident, appellee upon his arrival at the elevator, saw that the elevating machinery was not in operation, and that a portion of a rope which passed over a shaft was, while not detached from the shaft, so unwound as to lie on the floor. Appellee endeavored, as he says, to get the rope in shape, and in so doing stepped into the rope, and the machinery starting without the customary signal, the rope was wound up and catching him around the leg, he was so injured that the amputation of his leg became necessary.

The first amputation below the knee was afterward followed by a second amputation between the thigh and knee.

The jury returned a verdict for the plaintiff for \$25,000. Upon a remittitur of \$10,000, judgment for \$15,000 was entered.

The defendant asked the court to give to the jury the following as an instruction:

"The law of this State permits the plaintiff to be a wit-

Chicago & Grand Trunk Ry. Co. v. Spurney.

ness in his own behalf, but it allows the jury to take the fact of his interest in the event of the suit into consideration, for the purpose of affecting his credibility as a witness."

This the court refused to do; it did, however, at the instance of the plaintiff, instruct the jury as follows:

"In determining upon which side the preponderance of the evidence is, the jury should take into consideration the opportunity of the several witnesses for seeing or ascertaining from their own personal knowledge the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent consistency, fairness and congruity of the evidence; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence."

This, it is urged, was the equivalent of the instruction upon this subject asked by the defendant.

We do not agree with counsel for appellee as to this matter.

The instruction given by the court was merely that in determining upon which side the preponderance of the evidence lay, the jury might take into consideration, among other things, the "interest or lack of interest, if any, in the result of the case" of the several witnesses, and the relation or connection, if any, between the witness and the parties. The statute admitting interested parties to testify, in terms declares that the interest of a witness may be shown for the purpose of "affecting the credibility of such witness," and the defendant was entitled to have the jury so instructed. West Chicago Street R. R. Co. v. Estep, 162 Ill. 130.

The phraseology of the eighth instruction given for the plaintiff, while not approved, is, in view of other instructions given, not so prejudicial that because of it the judgment of the court below should be reversed.

VOL. 69.] Chicago & Grand Trunk Ry. Co. v. Spurney.

The court gave the following instruction:

"If the jury find from the evidence that the plaintiff has made out his case as laid in his declaration, by a preponderance of the evidence, then the jury must find for the plaintiff."

The plaintiff evidently intended, in the first count of his declaration, to charge that his injury was the result of negligence of the defendant in failing to provide proper appliances in connection with the elevating machinery. There was evidence showing that there was no whistle or warning apparatus giving notice when the machinery was about to start, but there was no evidence that the injury resulted from such cause.

We are, however, inclined to think that, after verdict, the first count, omitting certain portions as surplusage, might be treated as a charge that the injury was occasioned by negligently setting the machinery in motion when appellee was working thereon. We are, consequently, not prepared to hold that it was error to give this instruction.

Such instruction being in this State proper, the jury may perhaps be presumed to be capable of sifting surplus averments from a count, and ascertaining if the remaining allegations have been proven. A motion to instruct the jury that under the evidence there could be no recovery under the first count, was not made.

At the instance of the plaintiff the jury were instructed that in determining the amount of damages they might take into consideration "any future bodily and mental pain or suffering, or future inability to labor or transact business, if any, that the jury believe from the evidence the plaintiff will sustain by reason of injuries received."

Future mental pain, that is, mere humiliation and grief resulting from a contemplation of a maimed and disfigured body, is not an element entering into an ascertainment of the pecuniary damage one has sustained as the result of negligence. I. C. R. R. Co. v. Cole, 165 Ill. 334; Peoria Bridge Ass'n v. Loomis, 20 Ill. 235; C., B. & Q. R. R. Co. v. Hines, 45 Ill. App. 299.

Calumet Stock Farm v. Rockefeller.

As the case must be tried again, with a new presentation of the evidence, we refrain from further comment upon the evidence.

The judgment of the Superior Court is reversed and the cause remanded.

Calumet Stock Farm v. Frank Rockefeller.

1. **BILLS OF EXCEPTIONS—*Effect of Amendments.***—Where an amendment of a bill of exceptions takes out of the record everything of which the appellant in his brief complains, the judgment will be affirmed.

Assumpait, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 15, 1897.

CHARLES SHACKLEFORD, attorney for appellant.

EDDY & BRECKENRIDGE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

An amendment of the bill of exceptions has taken out of this record everything shown by the abstract of which the brief of the appellant complains, and the judgment is therefore affirmed.

Alonzo H. Hayes and Charles F. Hayes v. Ernest Dale Owen et al.

1. **PARTIES—*Trustees in Foreclosure Proceedings.***—An omission to make the trustee a party in a proceeding to foreclose a trust deed is fatal to the decree.

Foreclosure, of trust deed. Error to the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Reversed in part and affirmed in part. Opinion filed March 15, 1897.

HENRY L. WALLACE, attorney for Alonzo H. Hayes, plaintiff in error.

LACKNER & BUTZ, attorneys for Charles F. Hayes, plaintiff in error.

ERNEST DALE OWEN, attorney for defendants in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is the case of a bill, with numerous amendments, filed by Alonzo H. Hayes to foreclose a certain trust deed in the nature of a mortgage, made by Charles F. Hayes to Adolph Loeb, trustee, to secure notes of said Charles F., amounting originally to \$12,666.66, of which notes it was alleged that Alonzo H. owned a part.

The mortgaged land consisted of several acres, which it was stipulated by the trust deed might be subdivided, and provisions were made for releases of lots in the subdivision upon the payment of proportionate amounts of the mortgage indebtedness.

Owen, by purchase from Camp, the immediate grantee of Alonzo F., acquired title to certain of the lots, subject to a specified part of the mortgage indebtedness, which Camp had assumed and agreed to pay as a part of his purchase price; and he, Owen, and his wife, who were defendants to the bill, filed a cross-bill setting up certain claimed equities through which they insisted that the lots so purchased by him were no longer liable for any part of the indebtedness, or if they were, then that other lots covered by the trust deed, and still remaining in Charles F., should be first sold.

The master reported that Alonzo H. was entitled to a decree, in part at least, for what he claimed, and that Owen was indebted to a specified extent, and that the material allegations of the bill, amended bill and supplemental bill of Alonzo H. were supported by the proofs, and that his prayer should be granted.

We do not discover that the master made and reported any findings upon the cross-bill of the Owens.

We infer, although they do not appear, that exceptions to

Ehdin v. Murphy.

the master's report were filed by the Owens. At all events, it is recited in the decree that a motion to overrule exceptions filed by them came on to be heard, and that said motion was denied, and thereupon the "bill" of Alonzo H. was dismissed for want of equity.

The record is so confused that we will not attempt to elucidate it; there being a single point made that is fatal to any decree of foreclosure, and which can be passed upon without much reference to the record.

Adolph Loeb, the trustee, was not made a party to either the original, amended or supplemental bills, or to the cross-bill. Such omission was fatal. *Lambert v. Hyers*, 22 Ill. App. 616.

A few days before the final decree dismissing Alonzo H. out of court was entered, a decree was made upon the cross-bill of the defendants, Owen, declaratory of their right to have the lots remaining in Charles F. sold first, and ascertaining which lots they were, etc. That decree must be reversed, under the assignment of errors by Alonzo F., for the reason that in the absence from the record of Loeb, the trustee, in whom the legal title to all the property is vested, an adjudication of such character was error.

The order, therefore, is that the decree of August 12, 1896, dismissing the bill of Alonzo H. Hayes be affirmed, but without prejudice to any further proceedings he may be advised to take, and the decree of August 8, 1896, declaratory of the rights of the defendants in error, Owen, under their cross-bill be reversed, and each party pay his own costs in this court. Affirmed in part and reversed in part.

John Ehdin v. Francis T. Murphy et al.

69 555
170s 399

1. **MECHANICS' LIENS—Are Purely Statutory.**—A mechanic's lien is purely statutory and can be maintained and enforced only upon a compliance with the conditions imposed by the statute creating it.

2. **SAME—Statement of Claim.**—Where the claim of the plaintiff is not for the gross price of an entire job, but for items of work done, the statement of claim, under section 4 of the mechanics' lien act of 1874, must show the date of the items.

Mechanic's Lien Proceedings.—Error to Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 15, 1897.

JOHN E. ANDERSON, attorney for plaintiff in error.

WILLIAMS, LINDEN, DEMPSEY & GOTTF, attorneys for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We will determine this case upon what we understand to be the law applicable to the claim of the plaintiff in error, without regard to any objections that could be urged against the consideration of the cause, based upon either the insufficiency of the record, or former appeal.

The plaintiff in error sought to establish a mechanic's lien upon premises which had been the property of one Annella Rood.

How the nearly forty defendants in error have become interested in the cause need not be detailed.

F. D. Rood was the husband of Annella. In 1892 this paper was made:

“CHICAGO, ILL., Dec. 28.

I agree to lay all common brick in the building to be erected by F. D. Rood at Forty-sixth street and Woodlawn avenue, according to the plans of F. J. Norton, for \$5.50 per thousand, kiln counted, the walls to be continuous on the two sides of building. If air courts of wood are built in the sides, then I am to have \$6 per thousand.

I will lay all stone foundations for \$7 per cord, quarry measure, and also set all cut stone in front at fifteen cents per foot, all openings to be counted out. If pressed brick are laid on side walls, for twenty feet more or less, at the front, I am to have \$18 per M. for laying the same, and will furnish the color for the laying.

Payments to be made every two weeks as work progresses. I furthermore agree to complete the mason work on said building within thirty working days.

JOHN ANDERSON & EHDIN.

Accepted: F. D. Rood.”

LeBeau v. P., C., C. & St. L. Ry. Co.

Thereafter, and before any work was begun, Anderson withdrew, and with the assent of the Roods, the plaintiff in error went on to perform the contract.

The verified statement filed by him with the clerk of the Circuit Court in attempted compliance with Sec. 4 of the act of 1874, as amended in 1897, was, so far as related to material and labor, as follows:

“Annella Rood and F. D. Rood, to John Ehdin, successor to Anderson & Ehdin, Dr.

To building and construction brick work, setting stone front, sills, etc., as per contract dated December 28, 1892, which said work was performed from said December 28, 1892, up and to the 2d day of June, 1893, upon the premises belonging to said Annella Rood and F. D. Rood, at Woodlawn avenue and Forty-sixth street, in the city of Chicago, more particularly described in claimant’s affidavit herein.

\$5,770.85

Credits.....	4,108.56
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Balance due.....	\$1,662.29.”
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This case is not, like *Moore v. Parish*, 163 Ill. 93, one in which a gross price is fixed for doing an entire job, but the plaintiff in error could recover only upon proof of items, and therefore his statement—to comply with the section cited—must show those items. *Campbell v. Jacobson*, 145 Ill. 389.

We need not consider any other feature of the case. The plaintiff in error failed in a condition precedent to his lien, and the decree denying him a lien is affirmed.

Leo LeBeau, a Minor, by his Next Friend, v. The Pittsburgh, C., C. & St. L. Ry. Co.

69	537
73	264
69	55
e114	12

1. **RAILROADS—Not Required to Warn People off of Public Streets.**—It is not the duty of a railroad company to keep or warn boys off of a public street used by it.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding:

Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

STATEMENT OF THE CASE.

On the 28th day of October, A. D. 1893, Leo LeBeau, who at that time was ten years and five months old, was, with other boys, playing upon Rockwell street, one of the public streets of the city of Chicago, where the same is intersected by Lexington street, another one of the public streets of the city of Chicago. The tracks of the appellee company run north and south on the said Rockwell street. Lexington street crosses the same at right angles, and runs east and west across Rockwell street.

The representative of the company was a tower man, who at that time was stationed in the tower, which was on Lexington street between two tracks of the appellee on Rockwell street. Leo had been at that point several times, with the knowledge and tacit acquiescence of the tower man, and had conversed with the tower man, and, in fact, had talked with the tower man on that day just before he was hurt. Leo saw a train of cars going north on Rockwell street, and as it crossed Lexington street attempted to jump on the train, and in doing so fell under the wheel of one of the cars; his right leg was badly mutilated so that it became necessary to cut the same off close to the body.

The evidence showed that Leo, with other boys of his age, had been at the intersection of those streets a number of times before, had played about the tracks, and at times either attempted to or had jumped upon moving trains. The evidence also showed that the tower man, with knowledge of their presence, at no time told them to keep off the trains, did not warn or caution them in any manner to go away from that vicinity, notwithstanding he saw them several times before the day of the accident.

The jury being instructed so to do, returned a verdict for the defendant, upon which there was judgment.

CASE & HOGAN, attorney for appellant; WM. P. BLACK, of counsel.

LeBeau v. P., C., C. & St. L. Ry. Co.

This court, in a very recent decision, has correctly held that "there is no such thing as the ordinary care of an infant. An infant is required to exercise such care as is to be expected from one of his age, intelligence and experience." Swift & Co. v. Rutkowski, 67 Ill. App. 209, 1 Chi. L. J. 709

GEO. WILLARD, attorney for appellee, contended that it was no part of appellee's duty to prevent appellant from jumping on its cars whilst the same were being propelled along the street. Railroad v. McLaughlin, 47 Ill. 265; Railroad v. Stumps, 55 Ill. 367; Same v. Same, 69 Ill. 409; Railroad v. Berg, 57 Ill. App. 521; Same v. Same, 162 Ill. 348.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that appellee was negligent in not warning the plaintiff to keep away from this crossing.

Such warning, unless enforced by physical force, it is not likely would have been of any service, nor does it appear that appellee had the right to warn or keep boys away from this place. Appellant was injured upon a public street in which he had a right to be. A warning to boys to keep away from a place into which they know they have a right to go, is not usually sufficient to induce them to keep away, especially when the warning is by one not clothed with authority.

No case has been cited in which it has been held to be the duty of a railroad to keep or warn boys off a public street used by it.

There was no evidence of negligence upon the part of appellee, and hence no question for submission to a jury. Grand Trunk Railroad Co. v. Ives, 144 U. S. 408-417; Werk v. Illinois Steel Co., 154 Ill. 302-308.

Doubtless, a moving train does offer a temptation to small boys, as does every moving vehicle; so, likewise, the windows of an untenantanted house often induce the throwing of stones thereat; while a farmer's orchard surrounded by a rail fence is a strong temptation.

VOL. 69.]

General Gas Co. v. Stuart.

From either of these causes may arise an injury to a young child, for which the owner of the carriage, house or orchard may be sued. The question then arises: Wherein was he negligent? Should he have kept watch and warned boys not to hitch or jump on to his car. Should he have covered the windows of his house, or removed the apples from his orchard?

It is apparent also, that the plaintiff was injured as a result of his failing to exercise such care as is to be expected from one of his age and intelligence.

Jumping from the ground upon a moving freight train is dangerous, all men and all ordinarily intelligent boys ten years of age know it to be so. C., R. I. & P. Ry. Co. v. Eninger, 114 Ill. 79.

It was not the duty of appellee to warn the plaintiff off the street wherein he was injured. C. & A. R. R. Co. v. McLaughlin, 47 Ill. 265; C., B. & Q. R. R. Co. v. Stumps, 55 Ill. 367; Same v. Same, 69 Ill. 409; C., R. I. & P. R. R. Co. v. Berg, 57 Ill. App. 521.

The judgment of the Superior Court is affirmed.

Judge Shepard did not participate in the consideration of, or judgment rendered in, this cause.

General Gas Company et al v. Ernest B. Stuart.

1. INJUNCTIONS—*When Error to Issue Without Notice.*—When no showing by a statement of facts is made by bill or affidavits, that the rights of the complainant will be unduly prejudiced, an injunction should not be issued without notice.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Order reversed. Opinion filed March 29, 1897.

STIRLEN & KING, attorneys for appellants; W. O. JOHNSON, of counsel.

General Gas Co. v. Stuart.

J. D. SPRINGER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee filed his bill, and without notice obtained an order for an injunction restraining the defendants thereto as prayed in the "said bill."

The bill, among other things, prayed that the General Gas Company be restrained from using new or other certificates of stock in said company representing 225 shares, theretofore issued to Kate Corning and Charles S. Corning, defendants, and that the said Charles C. and Kate Corning be enjoined from transferring or assigning the said 225 shares of stock, or any part thereof, and from voting any of said 225 shares at any meeting of the stockholders of said Gas company, and that said Charles S. Corning be enjoined from transferring to any person any right to the use of certain discoveries and inventions, in any of the territory of the United States. The discoveries and inventions alluded to were for making an illuminating gas.

The affidavit under which, without notice, the order for an injunction was made is as follows:

"Ernest B. Stuart * * * on oath states that he is the complainant in the above entitled cause; that the rights of the complainant will be unduly prejudiced if the injunction in this cause is not issued immediately or without notice to the defendant."

This is insufficient. No showing, by a statement of facts, was made by bill or affidavits that the rights of the complainant would be unduly prejudiced unless an injunction were issued without notice.

Unless a showing be made by a statement of facts from which such conclusion can be drawn, an injunction should not be issued without notice. Becker v. Defenbaugh, 66 Ill. App. 504.

The allegation in the bill, that "the said Charles S. Corning threatens to procure the assignment, transfer and delivery of the said 225 shares of stock, received by him from

VOL. 69.]City of Chicago v. Sperbeck.

your orator as aforesaid, as well as the exclusive right to use said discoveries and inventions in all the territory of the United States, lying west of the Mississippi River, to a *bona fide* purchaser for value, without notice of your orator's said rights, equities and interests therein, and unless restrained by the process of this court will do so," is a mere statement of a conclusion. What Corning said which complainant construes to be such threat, does not appear. Nor could the complainant know what Corning would do in the future; he had at most, as to this, only an opinion. As to such statement, see Earle v. Earle, 60 Ill. App. 360.

No sufficient reason appears for restraining the Cornings from voting upon the stock held by them.

Charles S. Corning had furnished a large sum of money, part of the consideration for his so doing being the issue of this stock. Appellee asks for an accounting, offers to pay what shall be found due to said Corning. Why, then, under the allegations of this bill, should Corning be restrained from voting upon stock which he properly holds?

The order of the Circuit Court, that a writ of injunction issue as prayed in the bill, is reversed. Order reversed.

69	562
94	525
69	562
97	586

City of Chicago v. James H. Sperbeck.

1. *DURESS—Recovery of Money Paid Under.*—Where, by reason of the peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests it is necessary to make payment of money, which in fact he does not owe, and which in equity and good conscience the receiver ought not to retain, he may recover it back; and so, also, when such a payment is made in ignorance of material facts which, if known, would have led him to refrain from making the payment.

Assumpsit, for the recovery of money paid under duress. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed, March 29, 1897.

City of Chicago v. Sperbeck.

STATEMENT OF THE CASE.

This is an appeal from a judgment for \$661.45, recovered by the appellee, Sperbeck, the case being submitted to the court without a jury, in an action to recover back money paid by him to the city of Chicago under an ordinance providing for the payment of an annual fee of \$100 for a license to be taken out by persons desiring to keep intelligence offices in that city. This ordinance was declared to be invalid in Keim v. City of Chicago, 46 App. Co. 445. This suit was to recover the sums of money paid for license fees by the plaintiff for keeping an intelligence office during the years 1888, 1889, 1890, 1891 and 1892, respectively.

At the trial the plaintiff, Sperbeck, testified in his own behalf that the license fee in 1892 was not paid by him until after he had been told that if he did not pay it he would be arrested. That in 1891 the circumstances were much the same as those of 1892. As to the payment made in 1890, his memory was not certain, but he attempted to state that it was generally understood that they would be arrested if they did not get a license. As to the payments for the other two years, the plaintiff testified that he paid the license fees in question to save himself from being arrested, on the ground that it was generally understood that he would be arrested if he did not pay the license.

Upon cross-examination the plaintiff admitted that he paid each license fee in question to the city collector at the city hall; that he never was taken there under arrest, or anything of the sort; that he believed the ordinance to be valid, and that he paid the license fee for the reason that he believed that he would suffer the legal penalty of the same, provided the fee was not paid. He further stated that the paper which was served upon him by the officer was a summons; that he was told so by the officer. It is not claimed that appellee was ever brought before a magistrate.

It is not claimed by appellee that he ever made any protest against the payment of these license fees.

The ordinance provided that no person shall keep an intelligence office in the city of Chicago without a license, "under the penalty of fifty dollars for each offense."

WILLIAM G. BEALE, corporation counsel; FRANK HAMLIN, assistant corporation counsel, attorneys for appellant.

A. BINSWANGER and FREDERICK A. WILLOUGHBY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In County of La Salle v. Simmons, 5 Gil. pp. 515, 516, it was proved by the plaintiff that, in the year 1837, the county commissioners of La Salle county gave notice that they would grant a license for a ferry across the Illinois river, at the town of Ottawa, to the person that would denote the largest sum of money to the county; that up to that time the plaintiff had kept the ferry, and was an applicant for a license to continue the same; that on the day the license was granted, several offers were made for the franchise, when the plaintiff finally bid the sum of \$500. The plaintiff then produced in evidence a book, which the county clerk swore was a book belonging to his office, in which the accounts of the treasurer were kept, and in which book the treasurer was charged, under date of July, 1837, with the receipt of \$500 from William Simmons as a donation to the county. As to the state of facts the Supreme Court said :

"What was the condition of the plaintiff, and what effect did this unauthorized arrangement of the commissioners have upon him ? He had been keeping the ferry, and was anxious to secure a continuance of the privilege; but instead of being permitted to have it by complying with the requisitions of the statute, and submitting to pay the highest tax which could be assessed on the franchise, he was compelled by the force of circumstances, over which he had no control, to advance a large sum of money in order to obtain the license. The illegal conduct of the commissioners put the plaintiff in their power, and taking advantage of his peculiar situation, they obtained money from him to which the county had not the shadow of right. The money was unlawfully and wrongfully obtained, and could not, in equity

City of Chicago v. Sperbeck.

and good conscience, be retained by the county. The fact that the commissioners chose to call it a donation, does not change the real character of the transaction. It was merely a device to obtain money which the county had not the slightest right to demand. The money was exacted from the plaintiff under circumstance that strip the transaction of all the features of a voluntary payment. It was in law and fact a compulsory payment, as much so as the payment of usurious interest, which the lender exacts from the borrower, or the payment of illegal charges, which an officer demands as the condition of the performance of official services."

A judgment in this case, for the plaintiff, for the amount so paid by him, together with interest thereon, was sustained.

To the same effect is the case of Harvey and Boyd v. The President et al., of the Town of Olney, 42 Ill. 336. In this case the money was paid under protest, whereas, in County of La Salle v. Simmons, it was paid without protest.

In C. & A. R. R. Co. v. C. V. & W. Coal Co., 79 Ill. 121, a recovery of excessive charges for carrying coal was approved, the court saying: "It can hardly be said these enhanced charges were voluntarily paid by appellees. It was a case of 'life or death' with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them, which, in equity and good conscience, they ought not to retain." Ripley v. Gelston, 9 Johns. 201; Taylor v. Taylor, 20 Ill. 650; Watson v. Woolverton, 41 Ib. 241.

In Bradford v. Chicago, 25 Ill. 411, the recovery of money paid, had in satisfaction of a void special assessment, was sustained, the court saying: "When, therefore, a party, not liable to taxation, is called on peremptorily to pay upon such a warrant, and he can save himself and property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily; and, by showing that he is not liable, recover it back as money had and received.

In Prickett v. Madison County, 14 Ill. App. 454, the court, reviewing the authorities, said: "The principle to be deduced from these cases and the authorities cited in them seems to be that where, by reason of the peculiar facts, a reasonably prudent man finds that in order to preserve his property or protect his business interests, it is necessary to make payment of money, which indeed he does not owe, and which in equity and good conscience the receiver ought not to retain, he may recover it, and so also when such a payment is made in ignorance of material facts which, if known, would have led him to refrain from making the payment."

We do not regard the fact that appellee paid without protest as material. Meek v. McClure, 49 Cal. 623.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE SHEPARD.

This case seems to be, in principle, exactly like that of Holder v. City of Galena, 19 Ill. App. 409, the reasoning of which commends itself to me, and I am only restrained from dissenting here in the hope that the Supreme Court may be afforded an opportunity to pass upon the question.

69 566
181s 199

Simon Kruse, who sues as well for the County of Cook and State of Illinois as for himself, v.

Francis J. Kennett et al.

1. PENAL STATUTES--*Are Strictly Construed.*--Penal statutes are strictly construed, and where a suit is brought under such a statute the plaintiff, to maintain his action, must make a case clearly within the provisions of the statute he invokes.

2. SAME--*Application of Section 132 of the Criminal Code.*--Section 132 of the Criminal Code, relating to gambling and the recovery of money lost at, does not cover the offenses mentioned in section 130 of said Code. A specific penalty is provided for the misdemeanors mentioned in the latter section.

Qui tam Action.--Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

Kruse v. Kennett.

STATEMENT OF THE CASE.

This was a *qui tam* action brought by the plaintiff in error, who sued as well for the county of Cook as for himself, against defendants in error, doing business as Kennett, Hopkins & Co., to recover three times the amount of money alleged to have been lost in gambling. The declaration consists of three special counts, and is in substance as follows:

“For that, whereas, the defendants heretofore, to wit: on the 7th day of September, A. D. 1893, at the city of Chicago, county of Cook and State of Illinois, were engaged, under the firm name of Kennett, Hopkins & Co., in the business of gambling in grain and in wagering and betting on the market price of grain at a future time; and, whereas, the said defendants made an agreement with one J. Q. Savage that they, the said defendants, would, from time to time, as the brokers of said J. Q. Savage, but in their own, the defendants’ name, enter into contracts with divers persons for the purchase and sale of grain for future delivery, and that there should be no delivery of the grain so purchased or sold, and that it was then and there further agreed and understood by and between said defendants and the said J. Q. Savage, that the said J. Q. Savage should not be called upon or required to receive, deliver or pay for any of the grain that might be so purchased or sold by the said defendants for the account of the said J. Q. Savage; that all of the contracts that might be made by the said defendants for the purchase or sale of grain as aforesaid, should be settled before the time for delivery arrived, by the payment or receipt of the difference between the price at which the grain was or might be bought or sold and the market price of like grain for like delivery at the time of settlement, and that all such transactions and deals in grain should be settled upon differences as indicated and determined by the fluctuation of the market; and that plaintiff says that it was then and there further agreed and understood by and between the said defendants and the said J. Q. Savage that the defendants should, from time to time, as the brokers of

said J. Q. Savage, but in their, the defendants' own name, make contracts to have and to give to themselves the option to sell and buy grain at a future time.

And that in pursuance of the aforesaid arrangement, agreement and understanding, and as the brokers of the said J. Q. Savage, the said defendants, not regarding the statute in such case made and provided, did heretofore, to wit, on the 7th day of September, A. D. 1893, at Chicago, aforesaid, enter into contracts for the purchase and sale of a large amount of grain, to wit, one million bushels of wheat and fifty thousand bushels of corn for delivery at a future time, and that before the maturity of any of said contracts, all of said deals and transactions in grain were closed and settled by the payment or receipt of differences and that no grain was delivered on said contract.

And that in pursuance of the aforesaid agreement and understanding, and of brokers of the said J. Q. Savage, the said defendants not regarding the statute in such case made and provided, did heretofore, to wit, on the 7th day of September, 1893, at Chicago aforesaid, enter into contracts in their own name, to have and to give to themselves the option to sell and buy at a future time a large quantity of grain, to wit, 100,000 bushels of wheat, and 100,000 bushels of corn.

And that for the purpose of reimbursing and indemnifying the said defendants against losses, which they had or might sustain by reason of the deals and transactions aforesaid, the said J. Q. Savage as J. Q. Savage, A. N. Knapp, Higbee & Savage, McIntosh & Savage, N. L. Stewart, and Savage & Forsythe, did heretofore, to wit, on the 7th day of September, A. D. 1893, at Chicago, aforesaid, pay to the said defendants a large sum of money, to wit, the sum of \$6,000, being money then and there lost and paid by the said J. Q. Savage to the said defendants at one and the same time exceeding the amount of \$10, and by the said defendants then and there won of and from the said J. Q. Savage, by wagering and betting on an unknown and contingent event, to wit, on the market price of grain at a future time,

Kruse v. Kennett.

contrary to the form of the statute in such case made and provided, and the plaintiff says that the said J. Q. Savage did not within six months from the time he lost and paid said several sums of money as aforesaid, bring suit to recover the same or any part thereof, whereby, and by force of the statute, to wit, section 132 of chapter 38 of the Revised Statutes of the State of Illinois, an action had accrued to the said plaintiff to have and recover of and from the said defendants as well for the said county of Cook, as for himself, the sum of \$18,000, being treble the amount in value of the said several sums of money lost and paid by the said J. Q. Savage to the said defendants as aforesaid."

The defendants in error filed a general and special demurrer, to each count of said declaration, the court below sustained said demurrer, and the plaintiff electing to abide by said declaration, judgment was rendered against the plaintiff for costs, from which judgment this writ of error is prosecuted.

FOSTER & KRUSE, attorneys for plaintiff in error.

WALTER S. HULL, attorney for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 130 of the Criminal Code of this State is as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 or more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

Section 132 of the Criminal Code is in part as follows:

"Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election of unknown or contingent event whatever, lose to any person, so playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. * * * In case the person who shall lose such money or other thing, as aforesaid, shall not, within six months, really and *bona fide*, and without *covin* or collusion, sue, and with effect prosecute, for such money or other thing by him lost and paid or delivered as aforesaid, it shall be lawful for any person to sue for, and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case, against such winner aforesaid; one half to use of the county, and the other to the person suing."

The provisions of section 132 do not cover the offenses mentioned in section 130. A specific penalty is provided for the misdemeanors mentioned in section 130.

A penal statute can not be extended by construction. *Edwards v. Hill*, 11 Ill. 22; *Chicago & N. W. Ry. Co. v. Stanbro*, 87 Ill. 195-197.

Penal statutes are strictly construed, and where suit is brought thereunder, the plaintiff, to maintain his action, must make a case clearly within the provisions of the statute he invokes. *Edwards v. Hill*, 11 Ill. 22.

Section 132 deals with games, amusements, things regarded as sport, which are innocent if nothing be wagered thereon, which are unconnected with business, and out of which no agreement arises unless there be betting upon the result.

Moore v. City of Chicago.

Section 130 renders unlawful a class of agreements before then innocent, and declares that all option contracts for grain, stock or other commodities, shall be considered gambling contracts and void. Schneider v. Turner, 130 Ill. 28; Same, 27 Ill. App. 220; Corcoran v. Lehigh & Franklin Coal Co., 37 Ill. App. 577.

Many such contracts were, before the enactment of this statute, entered into in the ordinary course of business, with no thought of sport or gambling; these are now illegal, but if carried out, one is not liable to be sued and compelled to pay three times the amount he may have paid over in satisfaction of the gambling contract.

The judgment of the Circuit Court is affirmed.

Robert Moore v. The City of Chicago.

1. **PENAL ORDINANCES—*To be Strictly Construed.***—Section 1312 of the ordinances of the city of Chicago does not make it an offense to be an inmate or frequenter of a “policy shop.”

Debt, on a penal ordinance. Appeal from the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term 1897. Reversed and remanded. Opinion filed March 29, 1897.

EDWARD H. MORRIS, attorney for appellant.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The whole record here as to the facts is:

“Stipulation as to facts is as follows: That the defendant was, on the 1st, day of October, 1896, in the city of Chicago, county of Cook and State of Illinois, arrested by a police officer of said city of Chicago, while he, the defendant, was actually in a certain room in a building on Clark

street, in Chicago, which room was then being used as a policy shop, or policy office; that the policy shop in question was, at the time of the arrest of the defendant, a room where persons went for the purpose of handing, or giving to the persons in charge of the place three numbers written on a small bit of plain paper, ordinary writing paper, together with ten or fifteen cents, or whatever sum the person desired; that the person in charge takes the money and paper containing the numbers, makes a minute or memoranda of the numbers and amount, writes his name or initials (to show that he has received the money) on the numbers or paper containing the numbers originally given him, and gives it back to the person who gave him the money, that the person paying the money and receiving the paper with his numbers thereon then goes out of the room, and at any time after 3 o'clock in the afternoon, he can, and is at liberty to return and ascertain whether the numbers chosen and written on his paper 'come out' as it is termed, on the drawings; that is, if the three numbers have been and are among fifteen other numbers which have been drawn in the city of Louisville, State of Kentucky, from 100 numbers, placed in a box and drawn out by a boy blindfolded; if the three numbers are among the fifteen drawn, then the person wins \$5.50 for the ten cents paid. If all three of the numbers are not among the fifteen drawn, then the ten or fifteen cents is lost; that no drawing takes place in the room or place where the numbers are given to the person in charge: that after receiving the numbers and money as hereinbefore stated, the person in charge of the room goes at about 3 o'clock out of his place to some place in Chicago, where he obtains a copy of the telegram from Louisville, State of Kentucky, showing the fifteen numbers which have been drawn there as before stated; that then such person returns to his room or place and lays the copy of the telegram on the table or other place, so that all may see what numbers have been drawn. That this is known as policy, and the room kept by such persons as a policy shop or lottery. That this is not E. O. A., B. C., roley-poley, keno or faro bank, roulette, shuffle-board, bagatelle, playing cards or pigeon-hole."

Banks Agricultural & Transfer Co. v. Masters.

Ordinance, section 1312, introduced in evidence as follows:

“Any person who is a frequenter, visitor, inmate, door-keeper, solicitor, runner, agent, abettor or pimp, of or for any house, store, grocery, hall, room or any other place where are kept any E. O. tables, keno table, faro table, shuffle-board, bagatelle, playing cards, pigeon-hole or any other instrument, device or thing used for gambling, whereon or with which money, liquor or other articles shall be played for, shall, upon conviction, be fined in a sum not less than \$5 and not exceeding \$100, or imprisonment in the house of correction for a term not more than ninety days, or both, in the discretion of the court before whom such conviction shall be had.”

In our unaided judgment (we have no appellee's brief), chary as we have often shown ourselves to be in confessing knowledge of gambling devices, the fact that the appellant was arrested in a room where, by the method described, adventurers generally lost the little that they risked, did not afford any reasonable degree of proof that he was one of the class or classes against whom the quoted section of the ordinance was directed; nor that the room mentioned in the stipulation as to facts was such a room as the ordinance mentioned.

The judgment of the Criminal Court, convicting the appellant of violating the ordinance, is reversed, and the cause remanded.

**Banks Agricultural & Transfer Co., use of, etc., v.
Joseph H. Masters.**

1. RECOUPMENT—*By Tenant When Sued for Rent.*—A tenant can not leave a lot of chattels in premises that he abandons and then sell them to his landlord, through the process of recoupment, when unpaid rent is demanded of him.

Transcript, from a justice of the peace. Writ of error to the Circuit

VOL. 69.] Banks Agricultural & Transfer Co. v. Masters.

Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 29, 1897.

STEELE & ROBERTS, attorneys for plaintiff in error.

H. B. SPURLOCK, attorney for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The defendant was the lessee from the plaintiff of a room furnished with one-horse steam power for light manufacturing purposes, and occupied and paid the stipulated rent therefor for three months. At the end of the third month (July, 1893), he explained to plaintiff's agent that the novelty with which he had been experimenting was a failure, and, to quote from his testimony, "told Mr. Banks (plaintiff's agent), it was the latter part of July I told him I wished to discontinue the use of his power; but if I could use the room I would pay for one month longer; that was the month of August.

Q. For one month? A. Yes, that is what I told him, one month longer. * * * In substance I said to him, after August, if I could not sell out, all the goods that were there could be pushed up in the corner, and I would pay him a little for storage; I told him I wanted them stored; I had no conversation with him concerning the goods after that. I never saw him on the premises, that I remember of; never, probably, after the latter part of July; I was not around the premises after that."

Defendant had paid rent for the three months preceding August, and according to his own version, agreed to pay rent, diminished by the use of the power which, it does not seem to be disputed, was reckoned at five dollars a month for the month of August, if he could be permitted to retain the room for that month.

It is not contended that the defendant did not retain the room for August under the arrangement made, nor is it claimed that he ever afterward paid either rent or storage. He, therefore, certainly owed fifteen dollars for that month.

Banks Agricultural & Transfer Co. v. Masters.

The plaintiff's claim, as disclosed by the evidence, was for rent for August, September and October, at the rate of fifteen dollars a month, and for November and December, at the rate of seven dollars and a half a month, making a total of sixty dollars, and plaintiff's agent testified that such was the agreement.

The defendant undertook to recoup against the claim of the plaintiff the value of some chattels which he left in the room, and he was allowed to testify, over the objection of plaintiff, that their value aggregated one hundred dollars, and the jury found the issues in his favor, and judgment went accordingly.

Even if we consider no evidence except that furnished by the defendant, the verdict was wrong, and ought not to have been allowed to stand.

His chattels were left by him exactly as they were when he quit work, in a room to which he had the key, that he admits he rented for one month, and he never afterward was around the premises.

Some time in the following year, 1895, when plaintiff presented a bill for the rent, defendant for the first time, afterward, inquired for the goods, and was then told by plaintiff's agent that they had been left in the building when plaintiff moved out.

A tenant may not leave in that way a lot of chattels which the defendant himself named as "stuff," in premises that he abandons, and then sell them to his landlord through the process of recoupment, when unpaid rent is demanded of him.

The plaintiff offered to prove that before it moved out of the premises, it caused a letter to be written by its agent to the defendant, notifying him that it was about to remove, and to give directions concerning his material or it would be left behind at his own risk, but the court refused to admit such evidence. We think such a ruling was error, in view of the evidence by defendant that preceded the offer, but we reverse the judgment upon the broader ground that no case for recoupment or set-off was made by the defendant. Reversed and remanded.

69 576
177s 68

Edward Bartlett, Adm'r, v. The Cicero Light, Heat and Power Co.

1. CORPORATIONS—*Liability for Negligence While in the Hands of a Receiver.*—An action will not lie against a corporation, to which its assets and the control of its affairs have been returned from a receiver appointed by a court of chancery, in a suit in which the corporation was defendant, for an injury caused by negligence in the operation of an electric plant of such corporation, during the time of the receiver.

TRESPASS ON THE CASE.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

CYRUS J. WOOD, attorney for appellant, contended that the appointment of a receiver to manage the business of a corporation does not dissolve the corporation, which still exists, with its powers not enlarged or restricted, and may still exercise its franchises. Its capacity of being sued is not affected. The receiver is legally the agent of the company although under the direction of the court. The title to the property is not affected. Heffron v. Gage, 149 Ill. 182; Safford et al. v. People, 85 Ill. 558; Rep. Life Ins. Co. v. Swigert et al., 135 Ill. 176; T. W. & W. R. R. Co. v. Beggs, 85 Ill. 80; Wyatt v. O. & M. R. R. Co., 10 Ill. App. 289; Kincaid v. Dwinelle, 59 N. Y. 548; O. & M. R. R. Co. v. Fitch, 20 Ind. 498; Beach on Rec., Sec. 335; Am. & Eng. Ency. of Law, Vol. 20, p. 125, and cases cited.

The receiver has only the temporary management of the company's affairs, the corporation still exists and has a right to build a fence, and is liable if it is not built. O. & M. R. R. Co. v. Russell, 115 Ill. 52.

Where the receiver is discharged, and the property restored with improvements, the company is liable for accidents during the receivership. Cook on Stock and Stockholders and Corporation Law, 3d Ed., Sec. 875, note 2, p. 1447, 1448, citing among other cases: Brown v. Rosedale St. Ry. 15 S. W.

Cartlett v. Cicero Light, Heat and Power Co.

Rep. 120; Texas, etc., Ry. v. Geiger, Id. 214; Texas, etc., Co. v. Bloom, 20 S. W. Rep. 133; Bloomfield R. R. v. Van Slike, 107 Ind. 480.

So also if, during the receivership, net income is applied to the permanent improvement of the railroad property and the receivership is afterward discharged and the road again turned over to the company, then the company is liable for torts during the receivership to the extent of such net income so applied. Am. & Eng. Ency. of Law, Vol. 20, p. 389; Texas, etc., R. R. Co. v. Johnson, 76 Texas, 421; Texas, etc., R. R. Co. v. White, 18 S. W. Rep. 481.

Damages for injuries to persons or property during the receivership caused by the torts of the receiver's agents and employes are classed as operating expenses and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Am. & Eng. Ency. of Law, Vol. 20, p. 385, and cases cited; Green v. Coast Line R. Co., 24 S. E. Rep. 814; Sloan v. Cent. Iowa Co., 62 Iowa, 728; Mo., etc., R. R. Co. v. McFadden, 32 S. W. Rep. 18; Yoakum et al. v. Kroeger and wife, 27 S. W. Rep. 953.

CUTTING, CASTLE & WILLIAMS, attorneys for appellee, contended that when a railroad is in the hands of a receiver who has full possession of its property, and entire charge of its affairs, the corporation itself is not liable for damages or injury caused by the acts or negligence of such receiver, or of his agents or employes. Washington, etc., R. Co. v. Brown, 17 Wall. 445; Davis v. Duncan, 19 Fed. Rep. 477; Metz v. Buffalo, etc., R. R. Co., 58 N. Y. 61; Leathers v. Ship Builders' Bank, 40 Me. 386; Godfrey v. The Ohio, etc., R. R. Co., 116 Ind. 30; Memphis Ry. Co. v. Stringfellow, 44 Ark. 322; Turner v. H. & St. J. R. R. Co., 74 Mo. 602; Am. & Eng. Ency. of Law, Vol. 20, p. 387.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

A majority of the court are inclined to believe that the reasons upon which McNulta v. Lockridge, 137 Ill. 270, was decided, should be sufficient to induce a reversal of this judgment.

The single question is, will an action lie against a corporation, to which its assets and the control of its affairs have been returned from a receiver appointed by a court of chancery, for injury caused by negligence in the operation of an electric plant of the corporation, during the time of the receiver?

But the opinion in the case cited assumes as unquestioned law, that no action will lie against a corporation under such circumstances, and though what is there said upon the point is perhaps *obiter*, we may not disregard it, in accordance as it is with the current of authority. With the law in this condition, it is better, practically, to find out whether the action will lie before incurring further expense in a trial.

The judgment that the action will not lie is affirmed.

George S. Poppers v. Clarence A. Knight and Paul Brown.

1. ARBITRATORS—*Revocation of Submission*.—A party can not, without good cause shown, revoke a statutory submission to arbitrators of matters in controversy in a pending suit.

2. SAME—*Stipulation as to Fees*.—A stipulation submitting a matter to arbitration, under the statute which provides that the arbitrators shall not be limited to the statutory fees, but that such fees shall be reasonable, is legal.

3. STIPULATIONS—*Enforced by the Courts*.—Courts continually enforce stipulations by which subsequent proceedings are controlled.

Assumpsit, for goods sold and delivered. Appeal from Circuit Court Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court, at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

FRANK SCHOENFELD, attorney for appellant.

WILLIAM G. ADAMS, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellees for goods sold and delivered, and they put in a set-off.

Poppers v. Knight.

Then the parties submitted the matters in controversy to arbitrators, pursuant to the provisions of chapter 10, R. S.

The arbitrators met, heard the testimony on behalf of the appellant, and began to hear that of the appellees, and adjourned the further hearing to another day, on which day there was another adjournment.

Before the day to which they last adjourned arrived, the appellant served upon the appellees and the arbitrators a notice that he revoked the power conferred upon the arbitrators, and moved the court to set aside the order of the court directing the submission of the cause to the decision of arbitrators, which motion the court denied.

Further hearings were had, participated in by the appellant, and the arbitrators made their award of \$578 in favor of the appellees, which being filed in court, the appellant filed exceptions to it, which were overruled, and judgment entered upon the award.

Two questions only are now argued by the appellant.

First, that the notice of revocation was effectual to terminate the power of the arbitrators. To that the answer is, that a party can not, without good cause shown, revoke a statutory submission to arbitrators of the matters in controversy in a pending suit.

The few cases to the contrary are overborne by the multitude in support of the proposition stated. See cases collected in 2 Am. and Eng. Ency. of Law, 598, 2d edition.

Second, that the statutory fees of the arbitrators would have been but \$24 and the court allowed \$150.

The stipulation for submitting the cause provided that the compensation of the arbitrators should not be limited to the statutory fees but should be reasonable. That the \$150 is not more than reasonable was proved. The appellant contends that although the arbitrators actually met times enough to entitle them to \$86 under the statute, yet the time consumed was "no more than four days." It is not contended that there were any willful or capricious meetings or adjournments unnecessarily, nor that the appellees were at fault in delaying the proceedings.

The record does not show that anybody was in fault, nor the cause of any delay. In the absence of any showing to the contrary, it must be presumed that good cause existed for the several adjournments, to no one of which does it appear that the appellant had any objection. The stipulation was signed by the appellant, and is binding upon him.

Courts constantly enforce stipulations by which subsequent proceedings are controlled. C. & N. W. Ry. v. Hintz, 132 Ill. 265; Morrison v. Hedenberg, 138 Ill. 22; City of Chicago v. Drexel, 141 Ill. 89; Lake Erie & Western R. R. v. Middlecoff, 150 Ill. 27.

On the whole case there is no error, and the judgment is affirmed.

Soren M. Peterson v. West Chicago St. R. R. Co.

1. INSTRUCTIONS—*Must be Based Upon the Evidence.*—It is error to give an instruction in a case when there is no evidence upon which such instruction can be based.

Trespass on the Case, for personal injuries. Error to the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 29, 1897.

T. H. GAULT and MCKENZIE CLELAND, attorneys for plaintiff in error.

ALEXANDER SULLIVAN, attorney for defendant in error; EDWARD J. McARDLE, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The plaintiff stepped on to the foot-board of a grip-car operated by the defendant; the car at such time was at a street corner; the plaintiff while standing upon the foot-board was carried against a coal wagon standing near to the

Peterson v. West Chicago St. R. R. Co.

track; his shoulder coming in contact with the wagon, his hold was loosed and he fell to the ground.

So much is undisputed.

The plaintiff claims to have been, when hurt, a passenger; that when he stepped upon the car it was at rest, and started afterward; that he did not have time to get into a seat ere he was hit by the coal wagon. The defendant contends that when the car was in motion with the coal wagon in plain sight, and so near the track that it was manifestly perilous to get or stand upon the foot-board, plaintiff jumped thereon and was almost instantly hit before there was time to stop the car; that the plaintiff's movement to board the car was seen by the gripman and others, who called out to him to look out, thus warning him to desist from his attempt; that being thus warned away by the servant of the defendant, it then refused to there receive him as a passenger, and consequently that he never became such; that the coal wagon was in plain sight, at rest, and must have been seen by plaintiff had he looked.

The declaration charges that the plaintiff, being a passenger upon defendant's car, the defendant negligently ran its car close to a wagon standing near to the track of said railway, and caused the said wagon to violently strike the plaintiff.

At the instance of the defendant the court gave the following instruction to the jury :

“The burden of proof is not on the defendant to show how the plaintiff came to fall. If the preponderance of the testimony does not show that he fell by reason of the car being suddenly started, your verdict should be for the defendant.”

There was no evidence warranting such instruction. All the evidence was to the effect that the plaintiff fell because he was struck by the coal wagon; there was none tending to show that he fell merely because of a sudden start of the car; the plaintiff did contend that the car started before he had time to get into a seat, but he did not attribute his fall to a sudden start.

VOL. 69.] Hyde Park Thompson-Houston Light Co. v. Brown.

The car was rounding a curve at a street corner when the plaintiff was hit by the coal wagon.

The judgment of the Circuit Court is reversed and the cause remanded.

69 582
172s 329

Hyde Park Thompson-Houston Light Company v. Esther L. Brown and Richard S. Thompson, Trustee.

1. **EASEMENTS—When They do Not Pass by Implication.**—An easement which is not apparent, which has not been used, and of which a grantor has no information, does not pass by implication.

2. **SAME—Partial Release of Mortgage Will Not Create, as to Land Not Released.**—The release by a mortgagee of certain described premises will not be construed as a release of the mortgage upon other portions of the estate in which the mortgagor has, without the consent of the mortgagee, seen fit to create, as against himself, an easement as an appurtenance to the lands described in the release.

Bill for Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

STATEMENT OF THE CASE.

On June 24, 1890, for the consideration of \$20,000, Esther L. Brown sold and transferred to James W. Johnson, lots 12 and 13, in block 17, in Hyde Park, in the county of Cook and State of Illinois, the area covered by said two lots having a south frontage on 53d street, next east of and adjoining the right of way of the Illinois Central Railroad.

At the time of the conveyance Johnson paid on account of the purchase price the sum of \$7,333.34, and gave to Mrs. Brown his two notes for the balance thereof, and to secure the payment of said notes said Johnson delivered to said Richard S. Thompson, trustee, a deed of trust, dated June 24, 1890, conveying the said lots 12 and 13, which deed of trust is now being foreclosed.

On June 25, 1890, James W. Johnson and wife sold and conveyed to the Thomson-Houston Electric Company the north seventy feet of said lots 12 and 13, and a right of way

Hyde Park Thompson-Houston Light Co. v. Brown.

ten feet wide over and along the east side of lot 13 not conveyed.

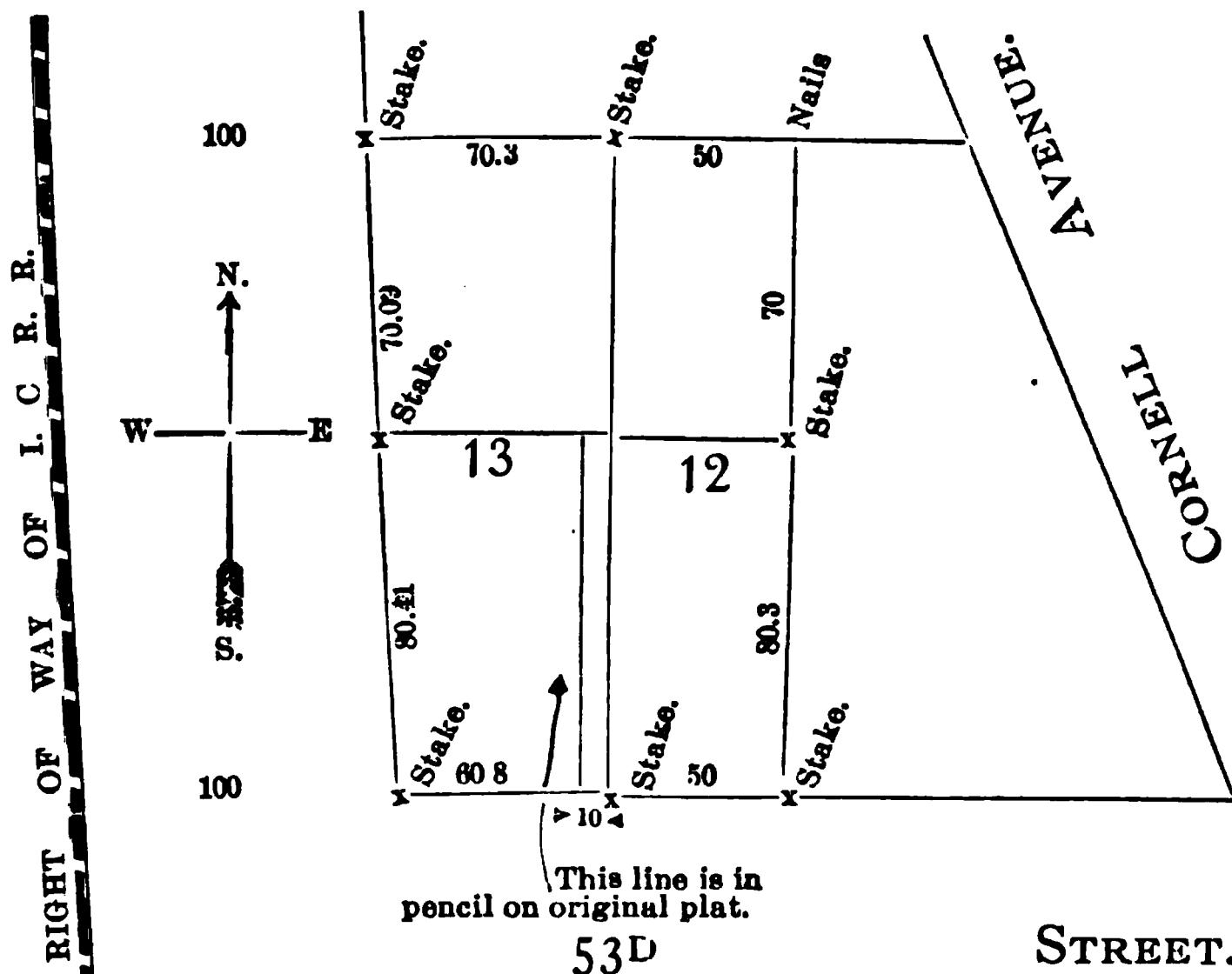
The following plat shows the premises:

TELEPHONE No. 9810.

MILTON K. STAUFFER,
LOT SURVEYOR AND CIVIL ENGINEER,
3004-53d Street, Hyde Park, Ills.

PLAT OF SURVEY

Lots 12 and 13 in Block 17, in Hyde Park Subdivision.



STATE OF ILLINOIS, { ss.
COUNTY OF COOK, { ss. This is to certify
that I have surveyed the above described property
according to the office record, and the above plat
correctly represents said survey.

MILTON K. STAUFFER.
Hyde Park, June 25, 1890.

VOL. 69.] Hyde Park Thompson-Houston Light Co. v. Brown.

On March 30, 1891, the Thomson-Houston Electric Company sold and conveyed to the Hyde Park Thomson-Houston Light Company the north seventy feet of lots 12 and 13, also the said right of way ten feet wide over and along the east side of said portion of lot 13, which is still owned by James W. Johnson.

The deed contained the further provision that the part of the lots not conveyed should be resorted to primarily for the satisfaction of Mrs. Brown's trust deed. The right of way seems not to have been used at any time.

On January 3, 1891, \$3,666.66 was paid by Mr. Johnson to Mrs. Brown, and Richard S. Thompson, trustee, executed and delivered to said James W. Johnson a release deed, releasing the said north seventy feet of lots 12 and 13, together with all the appurtenances and privileges thereunto belonging or appertaining. All of the deeds and release deeds are duly acknowledged and recorded.

Immediately after the purchase of the north seventy feet of said lots by the Thomson-Houston Electric Company it commenced the erection of a large electric light plant, and completed same about the month of December, 1890, and furnished lights to the public generally.

Mrs. Brown continued to live in her old homestead located upon a portion of one of the lots not conveyed by Johnson until some time in November, 1890.

The north seventy feet of said lots is bounded on the west by the Illinois Central Railroad, on the north and east by improved lands of Mr. Porter and Mr. Gray, and on the south by the south eighty feet of said lots 12 and 13, which is still owned by said James W. Johnson. The appellant, the Hyde Park Thomson-Houston Light Company, and its predecessors in title, do not, and so far as appears, never have, owned any lands adjoining the said lots 12 and 13. The prayer of the complainant's bill in this cause is that the mortgage given by Johnson to secure Mrs. Brown be foreclosed and that the south eighty feet of said lots 12 and 13 shall be sold at foreclosure sale. Complainant claims that if appellant Hyde Park Thomson-Houston Light Company

Hyde Park Thompson-Houston Light Co. v. Brown.

has any right of way over said portion of the south eighty feet of said lots, such right is subordinate to the lien of the said trust deed, and should be divested by a sale under said trust deed, and that the property now covered by said trust deed should be sold as is provided in the decree.

The contention of appellant is :

First. That Mrs. Brown agreed to release not only the north seventy feet of said lots 12 and 13, but to release the east ten feet of lot 13, conveyed by James W. Johnson to the Thomson-Houston Electric Company for a right of way.

Second. That by the terms of said release, it does release the east ten feet of lot 13.

Third. That when the north seventy feet was released, Mrs. Brown impliedly released the east ten feet of lot 13, as opened by Johnson, as a street or right of way; that right of ingress and egress might be secured.

Fourth. That as the north seventy feet is so situated that there is no access except over the remaining portion of lots 12 and 13, or land of a stranger, a right of way passes as a way of necessity, and such right is not subordinate to the lien of the mortgage, and that said right shall continue so long as the necessity exists, because Mrs. Brown has conveyed all her rights in the north seventy feet, and can not compel the owner to trespass upon, or take by statute, or purchase lands of a stranger for the purposes of a way.

Fifth. As James W. Johnson conveyed an interest in the east ten feet of lot 13, which interest is now owned by the appellant, the property should be sold in inverse order of alienation; that is, the said east ten feet should be sold last, and the remainder of the property sold first, because if it is sold as a whole, then the appellant would be deprived of his right of redemption.

W. S. JOHNSON, attorney for appellant; J. S. CUMMINS, of counsel.

WILSON, MOORE & McILVAINE, attorneys for appellees.

VOL. 69.] Hyde Park Thompson-Houston Light Co. v. Brown.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The controversy in this case turns upon the effect, considering the circumstances under which it was made, of the release deed executed by Richard S. Thompson of the north seventy feet of lots 12 and 13, together with all the appurtenances and privileges thereunto belonging or appertaining.

At this time Mrs. Brown was under no obligation to do anything to aid appellant in obtaining or perfecting a claim to a right of way over lots 12 or 13 to Fifty-third street. Her conveyance to Johnson, through which appellant derived title to the north seventy feet of these lots, was of the entire lots; her purchase money mortgage from Johnson covered the property she conveyed; she was in no wise responsible for his conveyance of the north seventy feet of this property, or of a right of way along the east side of lot 13, and her rights as a mortgagee were not diminished thereby.

Under these circumstances, she consented to the execution by the trustee of the release deed stating that thereby was released "the north seventy feet of lots 12 and 13 (this release in no manner to effect the lien of said trust deed upon the remainder of the premises therein described)," * * * "together with all the appurtenances and privileges thereunto belonging or appertaining."

If her intention and the understanding of Mr. Johnson was, that the release should be not only of the north seventy feet of these lots, but of a right of way over the south eighty feet of lot 13, it is difficult to see why such intention was not plainly and unequivocally expressed in the release.

The master and the court below found that Mrs. Brown had, when she authorized the execution of the release deed, neither knowledge nor information that any right of way was claimed across the south eighty feet of lots 12 and 13.

No such right of way, appurtenance or privilege was apparent; it would, therefore, as the master found, be a fraud upon Mrs. Brown to construe the release to be what is not expressed therein, and was never intended by her or the trustee.

The use of the words "with all appurtenances" is not

Hyde Park Thompson-Houston Light Co. v. Brown.

necessary in order that easements pass with a grant of the estate to which they are attached. *Ingals v. Plamondon*, 75 Ill. 118–124; *Morrison v. King*, 62 Ill. 30..

An easement which is not apparent, of which the grantor has not made use, and of which he has no information, does not pass by implication. *Ingals v. Plamondon*, 75 Ill. 118.

The release by a mortgagee of certain described premises, will not be construed as a release of the mortgage upon other portions of the estate in which the mortgagor has, without the consent of the mortgagee, seen fit to create, as against himself, an easement as an appurtenance to the lands described in the release. *Harlow v. Whitcher*, 136 Mass. 553–554.

The case at bar is essentially variant from *Smith v. Heath*, 102 Ill. 130, in which the mortgagee is found to have co-operated with the mortgagor in inducing the purchase of lots under an implied understanding that a park should forever remain appurtenant thereto.

Mrs. Brown had no part in, and derived no profit from, the creation of the alleged necessity for appellant to have a right of access to 53d street.

The decree properly directs a sale, first of the premises retained by the mortgagor, and then of the remaining premises in the inverse order of alienation, with the following provision:

“If the aggregate amount bid for the said lands so offered in severalty shall be insufficient to satisfy this decree, then said master shall offer for sale said lots twelve (12) and thirteen (13) [except the north seventy (70) feet thereof], together as one parcel, with all easements and all rights and all claims therein of said defendants and of all persons claiming under them, save only the right of redemption provided by law, and if the amount bid for the said lands so offered together shall exceed the aggregate of the amounts bid for said lands when offered in severalty as above provided, then said master shall sell said lands together.”

In this there was no error. *Iglehart v. Crane*, 42 Ill. 261–268.

The decree of the Circuit Court is affirmed.

Augustine W. Wright and O. W. Meysenburg v. Annie L. Hildreth.

1. INSTRUCTIONS—*A Party can not Complain of Error in, When Like Instructions Were Given at his Request.*—One party to a suit has no right to complain of error in an instruction given for the opposite party, when like error appears in an instruction given at his own request.

2. QUESTIONS OF LAW—*Are for the Court.*—An instruction which puts the question to the jury whether a pipe was lawfully placed in a street, should not be given; the law is not to be left to a jury.

3. CUSTOM AND USAGE—*Can not Justify the Creation of a Nuisance in a Street*—An instruction telling the jury that in determining whether the defendant had exercised ordinary and reasonable care for the safety of others, they should consider whether a water pipe lying on a crosswalk was placed and maintained in the way that was usual and ordinary, should be refused. No custom or usage can justify the creation of a nuisance in a street.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Mr. Presiding Justice SHEPARD dissenting. Opinion filed March 29, 1897.

Otis H. Waldo, attorney for appellants.

REMY & MANN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants were engaged in the construction of a conduit for a cable railway in Dearborn street north of Van Buren. Much water was needed, which was brought through a two-inch iron pipe, turning north on Dearborn street across the cross-walk from west to east on Dearborn street on the north side of Van Buren.

By different witnesses this pipe is variously described; by some as lying upon the cross-walk, and by others as being on the top side three inches above the cross-walk, and as lying at distances varying from a few inches to three feet from the curb or edge of the sidewalk on the northeast corner of Dearborn and Van Buren streets.

Wright v. Hildreth.

November 3, 1893, about 6:15 p. m., the appellee was walking east on that cross-walk; when her toe caught in the pipe, she fell forward, struck her knee against the sidewalk, broke the knee cap, and received a permanent injury from which she has suffered great pain, and is partially disabled. For this she sued and has recovered \$2,500. We regard the verdict in her favor as one which the evidence warranted the jury to find. It is true, that the evidence shows that there was abundant light at that corner, and that she knew that work was going on in Dearborn street near to the cross-walk, but none that she knew of the pipe, or had any other cause to look for it than the general duty of ordinary care for her own safety.

The court, on behalf of the appellee, instructed :

“ You are instructed that if you believe, from the preponderance of the evidence, that the defendants, Wright & Meysenburg, placed, or caused to be placed, the iron pipe in question in Dearborn street; and if you further believe, from the preponderance of the evidence, that the said pipe was not properly covered or guarded; and if you further believe from all the facts and circumstances, as the same may appear from the greater weight of the evidence, that the want, if any, of a proper guard or covering was negligence on the part of the said defendants; and if you further believe, from the preponderance of the evidence, that the absence of such guard or covering, if any, was the cause of the fall of the plaintiff; if you believe she did fall, and if you also believe, from the preponderance of the evidence, that the plaintiff, at and just before the time she fell, if you believe she fell, was using due care and caution to guard against injury to herself, then you should find a verdict for the plaintiff and assess her damages.”

To that instruction the appellants make the objection that “it singles out for special comment particular portions of the evidence, thus giving undue prominence to them.” Also, that the words “at and just before the time she fell,” make the instruction erroneous.

The first objection is not based upon the fact; no portions

VOL. 69.]Wright v. Hildreth.

of the evidence are singled out, whatever other criticism the instruction may be subject to. We may not be understood as approving the instruction, but think it did no harm. Plaintiffs in this class of cases have much to fear from the zeal of counsel.

As to the second, the jury must have understood it as referring to her conduct before she had taken the step that brought her toe into contact with the pipe; and besides, the appellants, by instructions asked and given, limited the necessity of care on her part to "the time she was injured" or the "time of her injury."

"The defendant has no right to complain of error in an instruction given for the plaintiff, when like error appears in an instruction given at the defendant's request." Consolidated Coal Co. v. Haenni, 146 Ill. 614.

As to instructions asked by appellants, and refused, one put the question to the jury whether the pipe was "lawfully" placed in the street; the law is not to be left to a jury. Beidler v. Fish, 14 Ill. App. 29.

The others directed the jury that in determining whether the appellants were exercising ordinary and reasonable care for the safety of others, the jury should consider whether the pipe was placed and maintained in the way that was usual and ordinary.

The event has proved, what a very little reflection would have enabled the appellants to foresee, that this stumbling block was a peril to pedestrians.

No custom or usage of contractors can justify the creation of a nuisance in the street.

The judgment is affirmed.

MR. JUSTICE SHEPARD.

I think the judgment ought not to be affirmed, for the reason that, in my opinion, the appellee does not appear to have exercised reasonable care for her own safety.

Catholic Press Co. v. Ball.

Catholic Press Company v. Jemison Ball.

1. PLEADING—*Plea of General Issue, Not Verified, Does Not Put in Issue the Execution of a Written Instrument.*—In a suit by a servant against his master for a wrongful discharge, upon a contract in writing set out in the declaration *in haec verba*, pleading the general issue, without verifying the plea, does not put in issue the allegation of the declaration that the contract was made by the master.

2. INTEREST—*On Damages for Breach of a Written Contract.*—In a suit on a written contract of employment, brought by the servant for a wrongful discharge, he is entitled to interest on whatever damage he has sustained.

3. MASTER AND SERVANT—*Measure of Damages for Wrongful Discharge, When Suit is Brought Before Expiration of Term.*—In a suit by a servant for wrongful discharge, if the term of service ends before the suit come to trial, damages may be recovered to the end of the term, though the suit was commenced before that end.

4. NEW TRIALS—*Motions for, Can Not be Amended After They Have Been Overruled.*—Permission by a trial court to put an additional point into a motion for a new trial, given three days after the motion is denied and judgment entered, has no effect upon the correctness of the decision when it was made, and is nugatory.

Assumpsit, for a wrongful discharge. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

WILLIAM DILLON, attorney for appellant.

JAMES FANNING LATHAM, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for wrongfully discharging him from its service, declaring upon a contract in writing set out *in haec verba*. The plea, general issue not verified, did not put in issue the allegation in the declaration that the contract was made by the appellant. *Supreme Lodge v. Zuhlke*, 30 Ill. App. 98.

That the appellee was discharged after he had been employed about or nearly eight weeks, under an engage-

ment for a whole year, is not disputed, and nobody who knew anything as to why he was discharged, was called as a witness on the part of the appellant. The appellant did put in some correspondence between the appellee and strangers to this suit, dated during the period while he was in the service of the appellant, and we have read it. It is enough to say of it that we see in it nothing inconsistent with his engagement to give his whole time and attention to the business of the appellant.

He recovered \$1,511.

How that amount was made up, we will not specially investigate, for if it be, as the appellant insists, "excessive by at least \$50, and probably by \$111," on the items shown by the evidence, yet as the judgment was nearly two years after the end of the term of the engagement, and no interest has been allowed, the result can not be wrong. The contract was in writing, and the rejection of the services of the appellee has, in regard to interest, the same effect as the rejection of the lard in *Murray v. Doud*, 63 Ill. App. 247.

And besides the point, that the damages were excessive, was not made in the motion for a new trial; though it is true that three days after the motion was denied and judgment entered, the court gave the appellant leave to put the point into the motion; that had no effect upon the correctness of the decision when it was made, and when the appeal we are now considering was prayed and allowed.

If the term of service end before the suit for wrongful discharge come to trial, damages may be recovered to the end of the term, though the suit was commenced before that end. *Mount Hope Cemetery v. Weidenham*, 139 Ill. 67.

That case answers all the argument of the appellant on the measure of damages.

There is no error, and the judgment is affirmed.

.McIntosh v. Lewis.

Alexander McIntosh and Elizabeth McIntosh v.
Denslow Lewis.

1. COURTS—*Power to Undo Past Action*.—In all essential particulars this case is like *Angus v. Backus*, 58 Ill. App. 259, and *Chicago Title & Trust Co. v. Chicago & Northern Pacific R. R.*, *Ibid.* 388, and must meet the same fate.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

CHARLES S. MILLER, attorney for appellants.

CAMERON & MATSON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This record shows that May 5, 1896, in this cause proceedings were had as follows:

“ This cause being called for trial and the defendants failing to prosecute their appeal in this behalf on motion of plaintiff’s attorney it is ordered that said appeal be and the same is hereby dismissed at defendants’ costs for want of prosecution, and that a *procedendo* do issue herein to the court below. Therefore, it is considered by the court that plaintiff do have and recover of and from the defendants his costs and charges in this behalf expended and have execution therefor.”

September 18, 1896, the appellants, defendants below, moved the court to vacate and set aside these proceedings.

In all essential particulars the case is like *Angus v. Backus*, 58 Ill. App. 259, and *Chicago Title & Trust Co. v. Chicago & Northern Pacific R. R.*, *Ibid.* 388, and must meet the same fate. The reason for affirming is that the court had no jurisdiction in September to undo what it had done in May, whatever hardship it had inflicted upon the appellants.

The order appealed from denying the motion, is affirmed.

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John T. Collins v. J. S. D. Manville.

1. LIMITATIONS—When Action is Commenced, Decided by Laws of This State, Though Cause of Action Arises in Another State.—If by the commencement of a suit on a cause of action arising in another State, a court of this State acquires jurisdiction of the plaintiff and the subject matter within the time prescribed by the limitation laws of such other State for the commencement of a suit on such cause of action and at a later date acquires jurisdiction of the defendant in pursuance of the laws of this State, such jurisdiction is not ousted because service is had on the defendant after the time within which by the laws of such other State the action must have been commenced, and because by such laws no suit is considered as commenced until after service is had.

Assumpsit, on a promissory note. Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

OLIVER & MECARTNEY, attorneys for plaintiff in error.

PECKHAM & BROWN, attorneys for defendant in error.

**MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION
OF THE COURT.**

This writ of error is prosecuted from a judgment for \$3,280.80, recovered by the payee against the maker of the following promissory note:

Twelve months after date I promise to pay to J. S. D. Manville, or order, five thousand two hundred and fifty dollars, for value received, with interest at the rate of six per cent per annum, having deposited with him as collateral security, with authority to sell the same at public or private sale on the non-performance of this promise, and without notice one hundred and fifty-four shares of the stock of the Union Brick and Tile Mfg. Co., and one hundred shares of the stock of the Kennedy Brick & Tile Machine Co.

JOHN T. COLLINS.

(Indorsed on back): J. S. D. MANVILLE."

Collins v. Manville.

The suit was begun by the filing of a præcipe and declaration in assumpsit, and the issuance and delivery to the sheriff for service of a summons returnable to the September term of the court, on August 31, 1893, which was one day (not counting days of grace) less than six years from the day on which the note matured.

The original summons was returned "not found," as were also an alias and three pluries summonses that were returnable, respectively, to each of four succeeding terms, and a fourth pluries summons was returned served on February 9, 1894.

The note was executed and delivered at the place of its date, and neither party to it was then or has since been, a citizen or resident of this State.

The first proposition of counsel for plaintiff in error is, that the cause of action arose in New York, that by the laws of New York an action could not be maintained on the note there, by reason of lapse of time, and, therefore, one can not be maintained here in Illinois.

We do not understand defendant in error to deny that the cause of action arose in New York, nor that the pleas that were filed fairly and properly presented the proposition for which the plaintiff in error contends.

It was stipulated between the parties that Sections 380, 381, 382, 398 and 399 of the New York Code of Civil Procedure, and Section 20 of the Illinois Limitation Act, and Sections 1 and 9 of the Illinois Practice Act, should be introduced and considered in evidence without pleading the same.

The five sections of the New York Code, included in the stipulation, are as follows:

"Sec. 380. Other periods of limitation. The following actions must be commenced within the following periods, after the cause of action has accrued.

Sec. 381. Within twenty years. (Amended 1877.) Within twenty years: An action upon a sealed instrument.

But where the action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action is,

for the purpose of this section only, deemed to have accrued upon an eviction, and not before.

Sec. 382. Within six years. (Amended 1877.) Within six years: 1. An action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument."

"Sec. 398. When action deemed to be commenced. (Amended 1877.) An action is commenced against a defendant, within the meaning of any provision of the act which limits the time for commencing an action, when the summons is served on him or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

Sec. 399. Attempt to commence action in a court of record. An attempt to commence an action in a court of record is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county in which that defendant, or one of two or more co-defendants who are joint contractors or otherwise united in interest with him, resides, or last resided, or, if the defendant is a corporation, to a like officer of the county in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps, or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed within sixty days after the expiration of the time limited for the actual commencement of the action by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner."

Sections 1 and 9 of our Practice Act merely provide that the first process in actions in courts of record shall be a summons, made returnable, etc., and for the issuance of alias summonses where the original has not been served.

Collins v. Manville.

Section 20 of our Limitation Act is as follows:

“Sec. 20. When a cause of action has arisen in a State or Territory out of this State, or in a foreign country, and by the laws thereof an action thereon can not be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State.”

The real point in the controversy, upon the first proposition of plaintiff in error, is whether or not the acts that were done on August 31, 1893, in the way of commencing the suit, taken in connection with the further fact that summons was not actually served upon the defendant until more than five months afterward, were sufficient to stop the running of the statute of limitations.

It needs only that the quoted sections of the New York Code be read to conclude that such acts did not constitute the commencement of an action, or an attempt to commence an action, within the New York Code. But it is equally plain that such actions amounted to the commencement of a suit, under our decisions. *Schroeder v. Mer. & Mech. Ins. Co.*, 104 Ill. 71; *C. & N. W. Ry. Co. v. Jenkins*, 103 Ill. 588; *Hekla Ins. Co. v. Schroeder*, 9 Ill. App. 472. And so we are left to inquire what construction and effect should be given to Section 20 of our Limitations Act, already quoted.

Its purport is, that if “by reason of the lapse of time” no action upon the note in question could be maintained in New York, none could be maintained in Illinois.

When the suit was begun, “the lapse of time”—six years from the time the cause of action accrued—provided by the New York Code had not run. What was done by way of issuance and delivery to the sheriff, for service, of the summons, on August 31, 1893, constituted, under our laws, all that was requisite to the commencement of an action.

By the commencement of the suit, our courts acquired jurisdiction over the plaintiff and the subject-matter of the suit. It only remained to acquire jurisdiction over the defendant in order to proceed to judgment, which was finally done in pursuance of the laws of the forum.

Such jurisdiction could not, we think, be ousted because

of a different practice and procedure pertaining in New York, whereby no suit should be considered to have been "commenced" until after personal or publication service upon a defendant.

The "lapse of time" named in section 20 must, we think, refer to the time when suit was begun within the interpretation given to our laws by the Supreme Court of the State.

Had the law of New York been like that of Illinois with reference to what constitutes the commencement of an action, there could be no controversy, for August 31, 1893, was early enough under the laws of either jurisdiction to have "commenced" the action. *Non constat* but the defendant might have been personally served in the suit that was begun here, on the same day the summons issued, and in such case there could have been no controversy, for then everything to constitute the commencement of a suit, according to the New York law, would have been done.

It being plain that on the day the action was begun in this jurisdiction, one might have been "commenced" and maintained in New York, we do not think it was intended by section 20 that our courts should look any further. To require them to look further, as is asked in this case, would be to surrender our own methods of procedure and adopt those of another State.

The other questions in the case as to whether the note was accommodation paper to enable the payee (defendant in error) to borrow money, or was given by the maker to secure some optional engagements entered into between himself and the payee, were settled upon conflicting evidence against the plaintiff in error, and we can not say from a review of it all, that the questions were wrongly determined.

The application for a new trial upon the ground of newly discovered evidence was properly overruled. The evidence upon which the application was based was at the most only cumulative, and, if heard, we do not think should have altered the verdict.

Upon the whole record the judgment should be upheld, and it is therefore affirmed.

Knights of Pythias v. McLennan.

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Supreme Lodge Knights of Pythias v. Kate McLennan.

1. PLEADING—*Sufficiency of Averment that Contract Sued on is Contract of Defendant.*—A declaration which names the defendant in its commencement and then alleges that “the defendant made its policy of insurance and delivered the same to the plaintiff in words and figures following, to wit,” and setting forth the policy sued on, sufficiently avers that such policy is the contract of the defendant named in the opening clause.

2. SAME—*Payment of Dues to, and Compliance with Laws of Insurance Order.*—In a suit on an endowment certificate requiring payment of all assessments and compliance with all laws governing the order, as a condition to the certificate remaining in force, it is not necessary to allege such payment or compliance. If any assessments were made, or if there were any laws governing the order, it is for the defendant to show the facts.

3. SAME—*Facts only Should be Stated and not Matters of Law.*—In pleadings, facts only are to be stated, and not arguments, inferences, conclusions or matters of law, and an allegation in a plea that a board of control had power to enact rules, laws and regulations for the government of an order is bad, because it tenders an issue of law and not of fact.

4. CONTRACTS—*Acquiescence in Attempt of Third Party to Alter.*—While the parties to a contract may by mutual consent change its terms, an attempt by one not a party to the contract to do so does not bind one of the parties, although he may have had notice of and acquiesced in such attempt.

Assumpsit, on a membership certificate. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

BENSON LANDON and WILLIAM S. FORREST, attorneys for appellant.

McDANNOLD & PHELPS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by appellee against appellant to recover on a certificate of membership or policy of insurance, as it is termed in the declaration.

Which said certificate of membership is set forth in the declaration, *in haec verba*, the death of the assured, Kenneth McLennan, being averred.

To the declaration filed by the plaintiff below, the following plea was interposed :

"And the defendant says, that in a certain application for membership made by said Kenneth McLennan, which application was made a part of the said contract contained in said certificate, and was offered to said defendant as an inducement and consideration for the making of said certificate, the said Kenneth McLennan agrees to be governed by, and that the said contract so made should be controlled by all the laws, rules and regulations of the order governing said rank now in force, or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, and that under the provisions and conditions of said supposed instrument in writing and supposed certificate of membership in said declaration mentioned, which terms and conditions were accepted by said Kenneth McLennan, the said instrument in writing and supposed certificate of membership were issued upon consideration of full compliance by the said Kenneth McLennan with all the laws governing said rank, now in force, or that may hereafter be enacted, and that he should be in good standing under said laws at the time of his death, and that it was understood and agreed that any violation of the condition contained in said certificate of membership, or the requirement of the laws in force governing said rank, should render said certificate and all claims under it, null and void, and that at the time of the issuing of said certificate, to wit, on the 22d day of August, 1890, and ever since the board of control of said Endowment Rank had full power to enact laws, rules and regulations, and to alter and amend the same for the government of said Endowment Rank, and that in pursuance of such authority the said board of control of said Endowment Rank did, on, to wit, at its regular quarterly session, held in Chicago, from January 12 to 13, 1893, duly enact and adopt the following law, rule and regulation : ' If the death of

Knights of Pythias v. McLennan.

any member of the Endowment Rank heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or super-induced by the use of intoxicating liquors, narcotics or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then, in such case, the certificate issued to such member, and all claims against such Endowment Rank on account of such membership shall be forfeited; of the enactment of which law the said Kenneth McLennan had notice and acquiesced in from thence up to the time of his death, and the said law, rule and regulation remained and was in force and governed the said Endowment Rank at the time of the death of said Kenneth McLennan; and the defendant says that the death of said Kenneth McLennan resulted from self-destruction, by reason whereof the said certificate and all claims thereon against the defendant became forfeited and the defendant not liable to pay the same, or any part thereof."

A demurrer to this plea having been sustained, the defendant elected to stand by its plea, whereupon a jury was impaneled, and assessed the plaintiff's damages at the sum of \$3,000.

It is urged by appellant that it appears from the declaration, that the contract sued on was not the contract of the Supreme Lodge, Knights of Pythias, of the World. The declaration alleges that the defendant, on the 22d day of August, 1890, made its policy of insurance and delivered the same to the plaintiff "in words and figures following, to wit: "Thereafter there is set forth the certificate of membership introduced in evidence."

This was a sufficient averment.

The endowment certificate purports to have affixed thereto the seal of the Supreme Lodge, Knights of Pythias, of the World. It was shown that the president of the Knights of Pythias had stated that the class in which the deceased was

insured was sufficient to pay out \$3,000 to each deceased member. This, in the absence of anything to the contrary, sufficiently showed that the endowment certificate was a contract made by appellant.

It is also urged that the declaration will not support the judgment, because it does not aver payment of all assessments required, the payment of assessments being, in the endowment certificate, made a condition of its remaining in force.

It does not appear that any assessments were made. If there were any, the burden was upon appellant to show it.

It is also urged that the declaration fails to allege compliance by the assured with all laws governing the rank in force at the time of the issuance of the certificate, or thereafter enacted.

It does not appear that there were any laws governing the rank in which the deceased was insured in force at the time the certificate was issued, or thereafter enacted. If there were any such, it was for appellant to show the same. The declaration alleges that the said policy was in full force and effect when the said Kenneth McLennan died. This was a sufficient allegation in that regard. Appellant made no denial of this charge, but relied upon the special plea which it filed, to which, as we have before stated, a demurrer was sustained.

Nor, under the pleadings, was notice and proof of death and good standing in the rank, at the time of the death of the deceased, necessary.

The plea, to which a demurrer was sustained, alleges that on the 22d day of August, 1890, and ever since, the board of control of said Endowment Rank had full power to enact laws, rules and regulations, and to alter and amend the same for the government of said Endowment Rank.

This is a mere pleading of a conclusion—a statement as to the law.

The provision in the certificate of membership, or agreement which the deceased entered into, declares that a consideration of the obligation to pay the endowment therein

Knights of Pythias v. McLennan.

provided for, is that the assured should comply with all the laws governing the Endowment Rank of the order of Knights of Pythias then in force, or that thereafter might be enacted.

The agreement as to laws that might thereafter be enacted, was as to laws thereafter enacted by the Supreme Lodge, Knights of Pythias, of the World, of which the deceased became a member. There was no agreement that he was to be bound by laws that might thereafter be enacted by the board to control of the Endowment Rank.

Had appellant pleaded that after the issue of said certificate, the Supreme Lodge, Knights of Pythias, of the World, with whom the assured had contracted, had enacted the law, rule or regulation set forth in the plea, appellee could have joined issue thereon. Such pleading would have raised a question of fact for trial by a jury; as it was, the allegation that the board of control had full power to enact laws and the law set forth in the plea, tendered only an issue of law.

Upon an issue made as to whether the Supreme Lodge, Knights of Pythias, of the World, had made the law, rule or regulation set forth in the plea, appellant might have shown what the board of control had done, and what there was in the constitution or laws of the Supreme Lodge giving the board of control of the Endowment Rank authority to enact the law set forth in the plea. Appellee could not join issue upon the allegation that the board of control had full power to enact rules, laws and regulations for the government of the Endowment Rank, because such allegation tendered an issue of law, and not one of fact.

In pleading, facts only are to be stated, and not arguments, inferences, conclusions, or matters of law, in which respect pleadings at law differ materially from those in equity. 1st Chitty's Pleadings, 16th Am. Ed., pp. 236, 253 and 566.

Every plea should be true and capable of proof, for truth is the goodness and virtue of pleading, as certainty is the grace and beauty of it.

The plea alleges that of the enactment of the (alleged)

law set forth therein, the assured had notice and acquiesced in from thence up to the time of his death.

This is an allegation that the assured had notice of, and acquiesced in, the action of the board of control of the Endowment Rank in attempting to create a new law.

As the manner in which the so-called law was created is set forth, the charge amounts to no more than that the assured had notice of, and acquiesced in, what the board of control had done.

The contract of the assured was with the Supreme Lodge, Knights of Pythias of the World, and not with the board of control of the Endowment Rank. Quite likely the parties to the contract might, by mutual consent, have changed its terms, but an attempt by one not a party to the contract to change the agreement did not alter the compact, although the assured might have had notice of, and acquiesced in, such attempt.

In *Supreme Lodge, Knights of Pythias, of the World v. LaMalta et al.*, 31 S. W. 493, the Supreme Court of Tennessee held that the board of control had not power to enact the by-law set forth in the plea filed in this case.

We do not think that such question is before us, because the demurrer to the plea raised the question, not of the authority of the board of control to make such by-law, but whether there was properly charged in the plea that any such by-law had been made by the Supreme Lodge, Knights of Pythias of the World, with which alone the assured entered into contractual relations.

The judgment of the Superior Court is affirmed.

Samuel Chandler et al. v. Louisville Banking Co.

1. **CREDITOR'S BILL—*What Assets May be Reached by.***—A creditor's bill will not lie to reach assets of the debtor which the latter can not recover in his own name.

2. **DECREES—*On Conflicting Evidence.***—Where from a candid and full consideration of evidence, that was conflicting and about evenly bal-

Chandler v. Louisville Banking Co.

anced, a court of appeal is not able to say that a chancellor, who heard the whole case and saw the witnesses, came to an erroneous conclusion, his decree must be affirmed.

Creditor's Bill.—Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term 1897. Affirmed. Opinion filed March 29, 1897.

MILLARD R. POWERS, attorney for plaintiffs in error.

OLIVER & MECARTNEY, attorneys for defendant in error.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The question here involved is one of equitable priority between the defendant in error, and the plaintiff in error, Thompson, to accrued and unpaid rent due from the firm of William Goodrow & Co., a tenant and occupant of certain premises in Chicago, under a written lease from the plaintiff in error, Chandler.

The Louisville Banking Company, defendant in error, obtained a judgment at law for \$2,495, and costs, against Chandler on September 20, 1894, upon which an execution was duly issued and returned wholly unsatisfied. Thereupon, on September 14, 1896, it filed its creditor's bill against Chandler, and the members of said firm of Goodrow & Co., and other persons, and on September 19, 1896, filed its amended and supplemental bill, bringing into the suit one Dudley, who turned out to be only the representative of said Thompson, and attacking a judgment that was confessed by Chandler in favor of Dudley on August 20, 1896, and attacking also an assignment that purported to have been made on September 10, 1896, by Chandler to Dudley, of the lease under which the rent in question accrued.

Service of summons issued upon the original bill, was had upon Chandler and the Goodrows on the same day the bill was filed, September 14, 1896, and Dudley was served with summons upon the amended and supplemental bill on September 23, 1896.

Answers by all of the defendants were promptly filed, and the cause coming on to be heard on the merits, the chancellor gave a decree finding the material allegations of the bill and supplemental bill to be true; that of said rent accruing from the Goodrows to Chandler there remained due and unpaid at the filing of the bill the sum of \$2,830, and that since the service of process \$150 additional rent had accrued, making a total of \$2,980, and that the Goodrows were liable therefor; that there was, at the time of the decree, \$2,752.12 due from Chandler to the banking company, besides costs, making a total of \$2,763.62, which it was decreed should be paid by the Goodrows to the banking company in satisfaction *pro tanto* of said \$2,980 rent, so found to be due and unpaid from them to Chandler.

The claim of Thompson, through Dudley, for priority over the banking company to the amount of \$2,883.12 for cash advanced by Thompson to Chandler, rests, at last, upon two questions of fact, if we assume, as for the purposes of this opinion we do, that said amount was justly due by Chandler to Thompson.

One of those questions is, was there an oral assignment of the rent in question made by Chandler to Thompson on August 18, 1896, which was the date of the last advance of \$250, made by Thompson to Chandler?

We agree with counsel for plaintiff in error that the equities of the banking company are susceptible of being worked out only through Chandler, and hence, if as between Chandler and Thompson, such an assignment was at that time made by Chandler to Thompson as would estop Chandler from questioning it in equity, it would so operate as between the banking company and Thompson. *Bonte v. Cooper*, 90 Ill. 440.

But from a considerate examination of the evidence upon that question, our conclusion is, that there was neither a legal nor an equitable assignment of the lease, nor of the rent due or to become due thereunder, made at that time under which Thompson could claim anything as against Chandler, or anybody else, either at law or in equity.

Chandler v. Louisville Banking Co.

The other question is, was the assignment of the lease that was executed on its back by Chandler to Dudley (who stood in place of Thompson) made on September 10, 1896, the date it bears, or was it made after September 14, 1896, the day on which the Goodrows—the lessees—were served with summons upon the original bill, and dated back as of the tenth?

Dudley was not called as a witness. Chandler and Thompson testified, but neither of them said anything upon that subject.

Mr. Powers, counsel for plaintiffs in error, testified that he wrote the assignment and that it was signed by Chandler in his presence on the date it bears, and that he “immediately went to the office of Mr. Williams and showed him the lease. * * * I am quite sure that I showed Mr. Williams the assignment on the back of the lease on September 10th.

Q. Did you call Mr. Williams' attention particularly to this assignment on the 10th? A. Yes, sir; because I told him that I should not, under any circumstances, rely upon the creditor's proceeding; that I should rely upon the assignment of the lease.”

Mr. Williams was the attorney for the Goodrows, and he and Mr. Powers had previously had a number of consultations together regarding the amount of rent that was due upon the lease, and how its payment by the Goodrows could be made with safety to themselves against the claims of other persons whose rights, or supposed rights to the rent need not be mentioned in this connection.

Mr. Williams was the only other witness who testified upon the subject, and his testimony was:

“I think I first saw the assignment on the back of the lease on the morning of the 15th of September (1896). * * I am certain that it was after the service on the Goodrows in this suit.

Q. What time, if at all, were the summonses served on the Goodrows brought to your office? A. They were brought to my office late in the afternoon on the same day that the bill was filed.

VOL. 69.]Chandler v. Louisville Banking Co.

Q. Was that Monday, the 14th? A. I think that was Monday, the 14th of September. * * *

Q. Mr. Powers has stated that he saw you on the morning of September 10th, and showed you that assignment. What can you say with reference to that? A. I did not see that assignment until the morning of the 16th (15th?), I am positive of that.

Q. Now, did Mr. Powers, on September 10th, say anything to you about his having any assignment on that lease? A. No. * * * I saw very little of the adjusting and accounting had on the 10th, because I was in and out of the office during the afternoon, and Messrs. Goodrow and Powers together talked the matter over. * * * Mr. Powers came into the office the morning after the bill was filed in this case, and I said to him that we were confronted by another creditor's bill. Mr. Powers said, 'Well, what of it?' And I said, 'There is this about it, there is another claimant for the rents.' He then took the lease out of his pocket and said, 'Well, I have an assignment of the lease.' He then handed me the lease and I read the assignment on the back of the lease. Then we had some little talk about the assignment. I don't now recollect just what was said, but I know I hesitated about doing anything further in the matter, and I think Mr. Powers then left the office. I don't recollect anything else that was said at that time; I know I didn't see that assignment before; I have a distinct recollection about that."

Inferences might be drawn from the date which the assignment bore, and from other circumstances surrounding the then pending negotiations, which would to some extent, and about equally, confirm the recollection of each of the witnesses, Mr. Powers and Mr. Williams, who alone testified directly upon the question.

But from a candid and full consideration of all the evidence and the surrounding circumstances, we are not able to say that the chancellor who heard the whole case and saw the witnesses, came to an erroneous conclusion upon evidence that was conflicting and was about evenly bal-

West Chicago St. R. R. Co. v. James.

anced, that the assignment was, as against the defendant in error, void and ineffectual.

And we must, therefore, affirm the decree.

The defendant in error asks that it be allowed as costs the expense it has been put to in printing an additional abstract. We have found the additional abstract to be of material service in numerous respects wherein the original abstract was defective, but it was quite unnecessary to reprint, as was done, the whole of the original abstract. One-half of the cost of printing the additional abstract will be ordered to be taxed against the plaintiff in error.

West Chicago Street R. R. Co. v. Benjamin Franklin James.

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1. **SURPLUSAGE—*Stating Duties in Actions for Negligence.***—In actions for negligence, charging that certain things were a duty, is mere surplusage. The duty, if any, results from the existing facts which should be stated.

2. **PASSENGERS—*When Persons Become—Carrier Must Know who are.***—A person who has signaled a passing car to stop, and who, it having done so, is in the act of getting on to the same, having proceeded so far as to put his foot upon the step of the car, is a passenger, for whose safety the carrier is bound to exercise the highest diligence, and it is immaterial whether the carrier knows that such person has seized hold of the car and placed his foot upon the step or not, having stopped its car for the reception of passengers it is bound to take notice of all who occupy that relation.

3. **MEASURE OF DAMAGES—*Mental Pain in Actions for Negligence.***—Mere humiliation arising from the contemplation of a maimed or disfigured body, is not, in an action based upon negligence, to be taken into consideration in estimating the pecuniary loss which the plaintiff has suffered.

4. **SAME—*When Errors in Instructions as to, Not Ground for Reversal.***—In an action based on negligence where the plaintiff's right to recover under the evidence is clear, and the judgment he has obtained is not, for the injury which the jury had a right to believe he has sustained, excessive, taking into consideration only the proper elements of damage, it will not be reversed on account of an instruction allowing the jury to give damages for future mental pain.

VOL. 69.]West Chicago St. R. R. Co. v. James.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County: the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

CASE & HOGAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover for personal injuries. Upon the trial of the case it appeared that in May, 1894, appellee, being on Madison street at its intersection with California avenue, signaled one of the defendant's cars, proceeding eastward, to stop. The car did stop on the southeast corner of Madison street and California avenue. Madison street runs east and west, and appellee, who, when he first signaled the car was on the north side of Madison street, crossed over, passed around the rear of the hindermost car, took hold of the iron handles, and, as he says, "just got his toe upon the step of the car" when it suddenly started up, dragging him along for a distance of some fifty feet, when his grasp broke and he fell to the street, sustaining a severe injury to his arm; the car going on without paying any attention to him.

Appellee says that he passed around the rear end of the hindermost car because the gate was up on the north side of the car, thus rendering it necessary for him to go to the south side of the car in order to get on the same.

There was not entire agreement among the witnesses who testified, some stating that the car was in motion when appellee seized hold of it; but there was evidence from which the jury could properly find, and we think the preponderance of the evidence was, that the car had stopped to take on and let off passengers, and that the appellee took hold of the iron handles, and was attempting to get on the car before it started.

West Chicago St. R. R. Co. v. James.

The appellee in his declaration charges that on the day aforesaid, he became a passenger on said train at the intersection of West Madison street and California avenue, "and as such passenger signaled the agent in charge of said train at the proper place for stopping said train, to wit, at the corner of California avenue and Madison street, and thereupon said train was brought to a stop."

There is a manifest inconsistency in this allegation, as it is evident that a person standing in the street, does not become a passenger upon a passing street car, before he has signaled it to stop. We think, however, that the allegation that the plaintiff became a passenger before he signaled the train to stop, may, after verdict, be rejected as surplusage.

The declaration goes on to allege that thereupon said train was brought to a stop, and then and there became the duty of the defendant to give the plaintiff an opportunity to safely board said train before starting the same. In the entire declaration there is no charge that the signal given by the plaintiff was noticed or became known to the defendant, plaintiff having signaled the car to stop, and seeing it stop, had a right to assume that it had come to a halt at his request, and for the purpose of receiving him as a passenger.

As we have so often said, in this, as in other actions brought for negligence, charging that certain things was a duty, is mere surplusage. The duty, if any, results from the situation, the existing facts. Nor is there in the declaration any charge that the defendant, at the time it started its car, knew that the plaintiff was endeavoring to take passage thereon, or had seized hold of the iron handles placed for the assistance of passengers, or had put his foot upon the step. Such allegation is, in our judgment, unnecessary when it is charged in the declaration, in substance, that the car had stopped for the reception of passengers, and that the plaintiff was attempting to get on board the car and had one foot upon the rear step of the car.

A person who has signaled a passing car to stop, and who, it having done so, is in the act of getting on to the same,

VOL. 69.]West Chicago St. R. R. Co. v. James.

having proceeded so far as to put his foot upon the step of the car, is a passenger, for whose safety the carrier is bound to exercise the highest diligence. *Brien v. Bennett*, 8 Carrington & Payne, 724; *Smith v. Ry. Co.*, 32 Minn. 1.

Whether appellant knew that appellee had seized hold of the car and placed his foot upon the step before the car started is immaterial. Having stopped its car for the reception of passengers, it was bound to take notice of all who occupied that relation, and to exercise the highest degree of diligence for the safety of each.

While, therefore, the declaration of appellee is inartistic, we think that it is, after verdict, sufficient to sustain the judgment recovered.

The jury was instructed that if they believed from the evidence that the plaintiff has made out his case as laid in his declaration, by a preponderance of the evidence, then they must find for the plaintiff; and also, that if they believed from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendant, in manner and form as charged in the declaration, then the jury should find the defendant guilty.

It is urged that under the ruling of the Supreme Court in *Joliet Steel Co. v. Shields*, 134 Ill. 209, it was error to give such instructions, concerning such a declaration as was filed in this case. What we have already said is sufficient upon this matter, our opinion being that the declaration, in substance, plainly charges that the plaintiff was a passenger and thereby the duty of defendant to him ensued as a matter of law.

The jury was instructed that in estimating plaintiff's damages, if any, they might take into consideration "any future bodily and mental pain or suffering, if any, that they might believe from the evidence the plaintiff would sustain by reason of injuries, if any, he might have received."

Under the recent rulings of the Supreme Court in this State, followed by this court in *Chicago & Grand Trunk Ry. Co. v. Spurley*,—Ill. App.—opinion filed March 8, 1897;

Baker v. Deane.

I. C. R. R. Co. v. Cole, 165 Ill. 334—339, we are of the opinion that such instruction as to future mental pain or suffering, should not have been given. In Wisconsin such matter is allowed to be taken into consideration, but as we have before said, we think that in this State the rule is, that mere humiliation arising from the contemplation of a maimed or disfigured body, is not, in an action based upon negligence, to be taken into consideration in estimating the pecuniary loss which the plaintiff has suffered.

Nevertheless, the injury suffered in this case being, as there was evidence and the jury had a right to find, the breaking and crippling of the right arm, causing a permanent disability and lessening the earning capacity of the appellee, we do not think the damages by him recovered, \$2,500, are excessive.

It does not appear to us that the jury, in estimating the plaintiff's damages, were influenced by the instruction as to future mental pain, or gave any greater amount as damages than they would have done had such instruction been omitted.

We regard the plaintiff's right to recover, under the evidence, as clear, and the judgment he has obtained is not, for the injury which the jury had a right to believe he has sustained, excessive, taking into consideration only the elements of damage which it is proper to consider in an action based upon negligence.

The judgment of the Superior Court is therefore affirmed.

Frank E. Baker v. Royal E. Deane and George G. Brooks.

1. INSTRUCTIONS—*Error Without Injury*.—Where, upon the evidence a plaintiff could not recover, it matters not so far as he is concerned, what, if any, errors were committed upon instructions.

2. ERRORS—*Must be Disclosed by Abstract*.—Where affidavits filed in support of a motion for a new trial are not in the abstract, a court of appeal will not inquire whether they showed ground for a new trial or not.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

FERGUSON & GOODNOW, attorneys for appellant.

OLIVER & MECARTNEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant went to the store of the appellees, "who conduct and sell general restaurant furnishings, cooking utensils, ranges and general work," etc. A foreman named Martin was on the fourth floor in a manufacturing department in which tin was used. The appellant wanted some strips of tin, and on the main floor applied to a salesman named Ricketts for them.

Here the dispute begins. Baker says that Ricketts said, "Go up on the top floor, and let the foreman cut them out for you;" to which Baker replied, "It is a small matter. I don't want to go up four or five flights of stairs; you can send the boy up and have them cut," and Ricketts answered, "Never mind, come over here; I'll take you up in the elevator.

That Baker then said "very well," and followed Ricketts to an elevator. Ricketts tells substantially the same story to the end of the direction by him to Baker to go up for the strips, and that then Baker said he didn't wish to walk upstairs, and wanted to know if Ricketts would take him up in the elevator; to which Ricketts answered that they didn't have a passenger elevator, and Baker said "Well, I have rode on it before. Start me up."

They did go to the elevator, which was for freight, not passengers, and Ricketts pushed up a sliding door, and was doing what was necessary to bring the platform from above to the level of that floor, when Baker stepped by him into the shaft, and fell to the basement.

Baker testified that the place was dark, and he had never been there before. On both these points he was contra-

Long v. Jones.

dicted by a strong preponderance of the evidence, but upon his own version it was his own want of ordinary care in passing by Ricketts into the dark which led to his misfortune.

As upon the evidence the appellant ought not to recover, it matters not what, if any, errors were committed upon instructions. Ennis v. Pullman's P. C. Co., 60 Ill. App. 398; S. C., 165 Ill. 161.

Whether the affidavits furnished any ground for a new trial we will not inquire, as they are not in the abstract. City Electric Ry. v. Jones, 161 Ill. 47. The judgment is affirmed.

Estate of John D. Long v. George P. Jones.

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1. PROMISSORY NOTES—*Illegality of Consideration as a Defense—The General Rule Stated*—The general rule is that illegality of consideration, even though such consideration grows out of an act prohibited by statute, can not be set up against the *bona fide* assignee of a note unless the statute expressly, or by necessary implication, declares the note to be void.

2. SAME—*To Secure Money Loaned for Illegal Purposes, are Collectible by an Innocent Purchaser.*—A note given to secure the payment of money knowingly loaned to the maker of the note to enable him to bet and wager the same on a horse race is valid and collectible when in the hands of an innocent purchaser.

Claim in Probate.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge, presiding, Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

FRANCIS T. MURPHY and EDWARD H. MORRIS, attorneys for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This is an appeal from the judgment of the Circuit Court, on appeal there from the allowance by the Probate Court,

of the claim of the appellee against the estate as above named.

The question to be decided is stated in the brief of the appellant to be: "Is a note in the hands of an innocent purchaser, which was given to secure the payment of money knowingly loaned to the maker of the note to enable him to bet and wager the same on horse races, void?"

Pope v. Hanke, 157 Ill. 617, is pressed upon us by the appellant as decisive, but it is there admitted that "the general rule is that illegality of consideration, even though such consideration grows out of an act prohibited by statute, can not be set up against the *bona fide* assignee of a note, unless the statute expressly, or by necessary implication declares the note to be void;" and many text writers are cited as authority.

Now the act of loaning money with which to gamble is not prohibited by any statute. On principles of public policy courts will give the lender no aid, and that is the whole extent of discouragement to him.

There is no principle of public policy which would justify the punishment of the innocent for offenses of the guilty, and there is a very important principle of public policy involved in the question whether mercantile transactions shall be embarrassed by obstructing the circulation of negotiable instruments.

The case comes under the general rule quoted from Pope v. Hanke, *supra*, and the judgment is affirmed.

Augustus C. Beckstein v. John Gall.

1. FELLOW-SERVANTS—*The Relation Found to Exist.*—The court finds that the injury for which this suit was brought was caused by the negligence of a fellow-servant of the plaintiff (appellee) and that the defendant (appellant) is not liable.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. Reversed. Opinion filed March 29, 1897.

Beckstein v. Gall.

WALKER & EDDY, attorneys for appellant.

WILLIAM A. DOYLE and JAMES D. ANDREWS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

When this case was here with the names of the parties reversed—66 Ill. App. 478—we said that whether there was any other ground for refusing the appellee a judgment on the verdict in his favor, was a question not before us. Now it is.

On the evidence it appears that the appellee and a foreman under whom the appellee worked for the appellant, were unloading barrels of salt from a wagon, to which work the foreman had called the appellee. The barrels were open at one end, and the mode of unloading was that each man took hold of the barrel, and lifted it from the wagon to the ground. Probably by the haste of the foreman the appellee failed to get a firm hold on his side of the barrel, and it fell, breaking the leg of the appellee.

We did say on the other appeal—looking only to the language of the declaration and the special findings—that “it is not the law that if a master wrongfully puts his servant in danger, to co-operate with another servant, that the carelessness of the latter, co-operating with the danger, discharges the master from responsibility,” and we believe still what we then said; but on the evidence there is no ground to say that the appellee was put in danger, as words are used in common speech. Danger there is always—everywhere.

But the work to which the foreman called the appellee was work which jointly they could easily do, but in which, as the event seems to prove, more care by each for the safety of both was necessary than the foreman exercised.

For want of care by the foreman, the appellant is not responsible to the appellee—a fellow-servant.

The appellant asked an instruction that the verdict must be for the defendant; it was refused, and the appellant excepted.

He was entitled to that instruction, and for the error in refusing it the judgment is reversed without remanding.

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L. R. Williams v. Anson J. Moore.

1. COMMON LAW—*The Application of its Principles Changes with Changing Conditions.*—The application of the principles of the common law is modified from time to time, with the changing conditions under which business is transacted, obligations are entered into and men live.

2. HOTEL KEEPERS—*Are Responsible for Baggage Received by Agent Outside of Hotel.*—A person who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent in its custody, so far as to make the hotel keeper responsible for goods which by means of the possession of such checks his representative or agent receives, although the baggage be never brought to the hotel. And an expressman to whom the checks are given will be the agent of the hotel keeper, and not of the guest.

Trespass on the Case, for loss of a trunk. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

STATEMENT OF THE CASE.

Anson J. Moore, the plaintiff below, a resident of the city of New York, in the summer of 1893, visited the city of Chicago and sought accommodations at the Park Gate Hotel, on the corner of Sixty-third street and Stony Island avenue; of which hotel the appellant, L. R. Williams, defendant below, was proprietor. After engaging rooms at said hotel, appellee delivered to a clerk in the office of the hotel, a ch. for a trunk in the custody of the Michigan Central Railway “for the purpose of obtaining said trunk and delivering it to him (appellee) at the hotel.” The trunk was never received by appellee, and he brought this suit against appellant for the value of the same, with its contents.

On behalf of the defendant it was shown that the Park Gate Hotel did not keep in connection therewith any conveniences or facilities for transporting the baggage of guests from railroad stations to said hotel, and that when such transfer had to be made the agents of the defendant em-

Williams v. Moore.

ployed for the purpose a certain F. Burgesen, who was engaged in the express business in the town of Hyde Park; that Burgesen had often been intrusted by him with private duties of a like character, and that he was a suitable and proper person for such purposes.

Burgesen testified that he had been in the express business for some years at 5130 Lake avenue; that in 1893 he had the trade of the Windermere, Vermont, Cornell avenue, Holland and Park Gate hotels, and that he also did Plank's private expressing; that he received the plaintiff's trunk from the railroad and tied it on his wagon; that the trunk was a very cheap affair and worth about seventy-five or eighty cents. Witness further stated that his charge for delivering trunks at hotels was fifty cents, and that neither the defendant nor any one connected with the hotel received any part of his charges or fees, and that the trunk was stolen from his wagon when he was not present.

The jury returned a verdict for the plaintiff, assessing his damages at \$334.10, upon which there was judgment.

SLUSKER & JOHNSON, attorneys for appellant.

JOHN J. McCLELLAN, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The ancient rule was, that so soon as the goods of the guest were brought within the precincts of the inn, *infra hospitium*, the responsibility of the innkeeper for their safe keeping begun. Story on Bailments, Sec. 478; 2 Kent's Com. 503; Cayle's Case, 8 Coke, 32.

The application of the principles of the common law is modified from time to time; with the changing conditions under which business is transacted obligations are entered into and men live.

In this country the baggage of travelers is usually transported in cars separated from those in which its owners ride; such owners receive from the carrier checks, a kind of

receipt, upon surrender of which the luggage is given up to whomsoever, so equipped, calls for it. In consequence of this, it has become a frequent custom for travelers to hand their baggage checks to a representative of a chosen hotel, and there, as its guest, await the arrival of the baggage the check calls for. It has consequently been held that one who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent in its custody, *infra hospitium*, so far as to make the inn-keeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage be never brought within the walls, yards or outbuildings of the hotel. *Dickinson v. Winchester et al.*, 4 Cushing, 114-121; *Sassun et al. v. Clark*, 37 Ga. 242.

Appellant voluntarily undertook to bring the baggage of appellee from the railway station to the inn; for this purpose appellant selected such agency as he saw fit. As an inn-keeper he undertook to do this; an undertaking customary and usual with his profession; as an inn-keeper he expected to be compensated for such service; and as an inn-keeper he is liable for the loss of the goods of his guest.

There was before the jury no disputed question of fact, save as to the amount to which the plaintiff was entitled.

The court might properly have instructed the jury to find for the plaintiff, and his oral statement in its hearing that he would do so, was immaterial.

The judgment of the Superior Court is affirmed.

Lindon W. Bates v. Charles Kaestner and Frank A. Hecht.

1. **ATTACHMENTS—*Jurisdiction*.**—In an attachment suit, if the defendant be not summoned on the writ, property belonging to him levied on, or a person indebted to him garnisheed, a judgment rendered is without jurisdiction and void.

2. **SAME—*Presumption as to Jurisdiction*.**—Even in collateral proceedings there is no presumption in favor of the jurisdiction in attachment cases where personal service is not shown.

Bates v. Kaestner.

3. **GARNISHMENT—Answer Must Show Possession of Property in Garnishee to Sustain a Judgment.**—Persons summoned as garnissees in an attachment suit answered that they owned an undivided half of two dredges, of which, so far as they were informed, the defendant owned the other half, and that the dredges were in the Chicago river. *Held*, that the answer did not show who was in possession of the dredges, and that a judgment containing an award of special execution for their sale was void.

4. **REVERSALS—A Void Judgment May be Reversed.**—The fact that a judgment is void is not an obstacle to reversing it upon error.

Attachment and Garnishment.—Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 29, 1897.

SAMUEL M. ST. CLAIR, attorney for plaintiff in error;
ULLMANN & HACKER, of counsel.

E. G. LANCASTER, attorney for defendants in error.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It is necessary to consider one point only in deciding this case.

The defendants in error commenced an attachment suit against the plaintiff in error. They found no debtor to him to garnishee, and levied upon no property. He was not summoned on the writ. There was therefore no jurisdiction acquired over him or his property by the suit. *West. v. Schnebly*, 54 Ill. 523.

Even when coming in question collaterally, there is no presumption in favor of the jurisdiction in attachment cases without personal service. *Firebaugh v. Hall*, 63 Ill. 81; *Drake on Att.*, Sec. 85.

The defendants in error endeavor to support the jurisdiction upon facts as follows: Two persons were summoned as garnissees, who answered that they owned an undivided half of two dredges, of which, so far as they were informed, the plaintiff in error owned the other undivided half, and that the two dredges were in the Chicago river.

No allusion to any possession by anybody, or to any use

VOL. 69.]

Niedner v. Friedrich.

being made, of the dredges is in the answer. There is as much reason to guess that Bates was in possession of them as to guess that the garnishees were, and upon neither guess can jurisdiction stand.

The dredges were not levied upon, but the defendants in error seem to have proceeded upon the assumption that Sec. 20 of Ch. 62, Garnishment, applied, and incorporated in their judgment an award of special execution for the sale of an undivided half of the dredges.

The judgment is void, but that is not an obstacle to reversing it upon error. Goodsell v. Boynton, 1 Scam. 555; Archer v. Ross, 2 Scam. 303.

The judgment is reversed and the cause remanded.

Otto Niedner et al. v Harry Friedrich.

1. **NEW TRIALS—*Grounds for, Not Stated are Waived.***—Where the reasons given for a new trial fail to show any objection to the admission of certain testimony, the admission of such testimony can not be questioned on appeal. A party will be held to have waived all causes for a new trial not set forth in his written grounds therefor.

2. **STATUTE OF FRAUDS—*Waiver of, After Filing Pleas.***—Where pleas setting up the statute of frauds were filed, but were never called to the attention of the court, and no allusion was made to the statute as a defense while the evidence of the agreement sued on was being put in, nor any objection made to the reception of any testimony, such defense will be deemed waived and will not be considered on a motion for a new trial. Persons intending to rely upon the statute can not postpone that reliance until after verdict.

Assumpsit, for labor. Appeal from the Superior Court of Cook County; the Hon. W. G. EWING, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

LOESCH BROTHERS & HOWELL, attorneys for appellants.

PINOKNEY & TATGE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Upon conflicting evidence a jury has found that the appellants, a firm composed of a father and two sons, junk

Gottschalk v. Jarmuth.

dealers, took the business and stock of another son, separately engaged in the same line, under an agreement with him to pay his debts, and that among those debts was the one upon which the appellee has recovered in this suit.

On the trial the wife of the last mentioned son was admitted as a witness for the appellee.

This was error and duly excepted to; but in the motion for a new trial the point was omitted, and thereby waived. Brewer v. Nat. Un. Bldg. Ass'n, 64 Ill. App. 161, and cases there cited in connection with Hintz v. Graupner, 138 Ill. 158.

By consent the court charged the jury orally—how is not shown.

On the motion for a new trial, for the first time, so far as the record shows, the statute of frauds was presented as a defense, for, although pleaded, it does not appear that the attention of the court was ever called to the pleas. No allusion to it was made while the evidence of the agreement was being put in, nor any objection made to the reception of any testimony except as before stated.

The statute of frauds is a defense easily waived. Beard v. Converse, 84 Ill. 512.

If the appellants intended to rely upon the statute, they should not have postponed that reliance until after verdict.

They naturally hoped that the verdict would be in their favor, without resorting to that defense, which is not a popular one; but they may not speculate upon the chances. Taylor v. Roby, 37 Ill. App. 147.

This view relieves us from considering the applicability of the statute—a question involved in a maze, compared with which the labyrinths of antiquity were king's highways.

There is no error, and the judgment is affirmed.

Fred Gottschalk v. Lissetta Jarmuth, Adm'x, Etc.

1. ABATEMENT—*Pl's in, Must be Interposed at First Opportunity.*—Pleas or defenses in abatement must be interposed at the first opportunity in any court, whether a court of record or not.

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VOL. 69.]Gottschalk v. Jarmuth.

2. **OBJECTIONS—When They Must be Made before Verdict.**—Any objection which could at the trial be removed by amendment, if made for the first time after verdict, comes too late.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

GEO. F. ORT, attorney for appellant.

J. W. RICHEY, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Upon appeal by appellant to the Circuit Court from a like judgment recovered before a justice of the peace, this judgment for \$200 and costs was rendered upon the verdict of a jury.

The suit was originally begun by appellee's testator, Fred Lembcke, her father, in whose favor the justice's judgment was rendered.

After the appeal to the Circuit Court the death of Lembcke was suggested and the appellee substituted as plaintiff, by stipulation of counsel.

The evidence tended to show an indebtedness of \$214 (of which all in excess of \$200 was waived), for brick sold and delivered to appellant by the firm of Lembcke & Wendel, of which appellee's intestate was a member, in 1889 or 1890, and that upon a partnership settlement between said partners, Lembcke paid to Wendel his share of said indebtedness and that appellant admitted the indebtedness and promised to pay Lembcke at least \$200 of the amount.

The objection that Wendel was not joined with Lembcke as a co-plaintiff, was not made until on the motion for a new trial in the Circuit Court. That was too late. Pleas or defenses in abatement must be interposed at the first opportunity in any court whether a court of record or not. See numerous authorities cited in Puterbaugh's Pl. and Pr. (7th Ed.), 36. And the rule is established that any objection which

West Chicago St. R. R. Co. v. Stiver.

could at the trial be removed by amendment, comes, for the first time, too late after verdict. *Citizens Gas Light Co. v. Granger*, 118 Ill. 266.

That the last bill of particulars, stating an amount admitted by the defendant to be due and owing, was dated in 1895, was not misleading or wrong. If claimed to be so, advantage should have been taken of it in the trial court. It was competent to show an admission of, and promise to pay the indebtedness, though made while the suit was pending.

There was not below, and is not here, any defense made on the merits.

The judgment appears to have been a just one, and it is affirmed.

We do not agree with counsel for appellee that statutory damages should be given.

West Chicago Street Railroad Company v. David S. Stiver.

1. **VERDICTS—Upon Conflicting Evidence.**—While the evidence in this case was very close and conflicting, it was passed upon by the jury under proper instructions, and their verdict must stand.

2. **STREET RAILROADS—Notice by Passenger of Desire to Alight—How Given.**—If one of the men in charge of a street car has notice, from the conduct of a passenger in his immediate presence and sight, that such passenger desires to alight from the car, such notice is as good as if given by express warning or notification by the passenger.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

DALE & FRANCIS, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee took passage at the intersection of Ogden avenue and West Madison street upon an east bound grip-car on appellant's Madison street line, and rode about half a mile to Center avenue.

He was in company with Doctor Ward, and it was about eleven o'clock in the evening in the month of May. Finding it was too cold upon the grip-car, they determined to change their seats, and to do so, they stepped down upon the foot board that ran lengthwise of the grip-car, in order to go into the trailer, which was an inclosed car, about the time the train reached Center avenue.

At that street crossing a man signaled the gripman to stop and let him get aboard. The speed of the train was slackened, if not entirely stopped, and the man got aboard. As soon as he did so the train was quickly started up, either from a complete stand-still or from a very slow speed. Doctor Ward succeeded in making the change from one car to the other in safety, but the appellee was either thrown from the foot-board by the sudden starting up of the train, or having stepped to the ground in safety, was thrown as he attempted to get upon the platform of the trailer while the train was in rapid motion. One of his legs was broken in two places, and for his injuries the jury gave him a verdict for \$700, upon which the judgment appealed from was entered.

There are some very close questions of fact in the case—whether the gripman or conductor had notice that appellee wished and intended to either get off the train, or to change his seat from one car to another—whether the train started suddenly and with a severe jerk, from a condition of repose to one of considerable speed while appellee was observed by the managers of the train to be in a place of peril, and whether, or not, the appellee was not guilty of contributory negligence by attempting to catch the guard of the trailer while the train was moving with rapid speed after he had safely reached the ground—but all of these, and

West Chicago St. R. R. Co. v. Stiver.

other questions, upon which the evidence was close and conflicting, were passed upon by the jury, and perhaps, considering the size of the verdict, with some of the hesitation we feel concerning them, and we ought not to reverse their finding.

We fail to appreciate the force of the appellant's argument upon an alleged variance between the evidence and the declaration, and therefore waive a discussion of it.

It is argued that the verdict was inconsistent with the seventeenth instruction given for appellant, which was as follows:

"If the jury believe from the evidence that the plaintiff by the use of ordinary care might have warned or notified the conductor or gripman of his, plaintiff's, desire to alight from the grip-car, and that he did not so warn or notify either of them, then the verdict of the jury should be in favor of the defendant."

The jury had the right, to find from the evidence, as they probably did, that one of the conductors, or the gripman, or both, had notice from the conduct of the appellee in their immediate presence and sight, that he wished to alight from the grip-car as soon as it came to the stop which the would-be passenger signaled the train to make; and if they or either of them did have such notice, it was as good as if given by express warning or notification by appellee. We must not be understood to approve of the instruction as given, although appellant can not complain of it—it being given at its request.

We are not prepared, in view of the general custom of street-car carriers of persons, to draw a distinction between foot-boards and car seats, as places of relative danger and safety, as we should have to do if we were to say it was error to refuse appellant's nineteenth instruction.

We are unable to say with certainty, that there is substantial error in the record, and will therefore affirm the judgment.

Albert S. C. Pennington v. Illinois Central Railroad Company.

1. RAILROADS—*Acceptance of Persons as Passengers on Defective Tickets.*—A person purchased a railroad ticket on November 27, 1893, good “if presented on date of sale shown on back.” He did not attempt to use it until December 10, 1893, when he went to the agent at the station who sold him the ticket, and inquired of him if the ticket was good for a trip on that day, and was informed that it was, and permitted to pass through the turnstile, as was necessary to do in order to reach the train. *Held*, that what was done was an acceptance by the company of such person as a passenger upon such ticket.

Trespass on the Case.—Ejecting passengers from a train. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed April 15, 1897.

JOHN C. TRAINOR, attorney for appellant, contended that the purchase of a punched ticket on assurance by agent that it was valid, does not justify expulsion. *Murdock v. Boston, etc., R. Co.*, 137 Mass. 293.

A passenger has a right to assume that an agent placed at a station will observe the rules with reference to such matters as dates in or on a ticket. What may be a rule to-day, may not be to-morrow. Conceding plaintiff to have known of the rule previously, he was not called upon to question the act of the agent, as to the rule on the day he bought the ticket. It is neither reasonable nor practical for passengers to take notice of such matters or attempt to correct agents in regard to them. *Ellsworth v. C., B. & Q. R. R. Co.*, 63 N. W. Rep. 584; *Yorton v. Milwaukee, L. S. & W. Ry. Co.*, 62 Wis. 367.

In the absence of any provision of limitation, a ticket is good at any time. *Penn. R. R. v. Spicker*, 105 Pa. St. 142.

C. V. GWIN, attorney for appellee; JAMES FENTRESS, of counsel. Where there is no subsisting contract or legal duty to carry between the passenger and carrier, no action can be maintained for the expulsion of the passenger.

Pennington v. I. C. R. R. Co.

In all such cases the gist of the action is a breach of an existing contract or legal duty to carry.

The act of expulsion adds nothing to the cause or right of action, and may serve only to show a breach of an existing contract or legal duty to carry, or may form an element of damage for such breach. C., R. I. & P. Ry. Co. v. Herring, 57 Ill. 59; C., B. & Q. R. R. Co. v. Griffin, 68 Ill. 499; Pullman Palace Car Co. v. Reed, 75 Ill. 125; Penn. R. R. Co. v. Connell, 112 Ill. 295; C. & N. W. R. R. Co. v. Bannerman, 15 Ill. App. 100; C. & A. R. R. Co. v. Willard, 31 Ill App. 438; Frederick v. Marquette, H. & O. Ry. Co., 37 Mich. 342; L. S. & M. S. Ry. Co. v. Pierce, 47 Mich. 277; S. C., 11 N. W. Reptr. 157; see 3 A. & E. R. R. Cas. 340; Hufford v. Grand Rapids, etc., R. Co., 53 Mich. 121; S. C., 18 N. W. 580; Thomas v. Chicago & Grand Trunk R. Co., 72 Mich. 355; S. C., 40 N. W. Repr. 463; Heffron v. Detroit City Ry. Co., 92 Mich. 406; S. C., 52 N. W. 802; Van Dusan v. Grand Trunk Ry. Co., 97 Mich. 439; S. C., 56 N. W. Rep. 848; McKay v. Ohio River R. Co., 44 A. & E. R. R. Cas. 395; Hall v. Memphis & Charleston Ry. Co., 9 A. & E. R. R. Cas. 349; Boise v. Hudson River R. Co., 61 Barb. 611; McClure v. Phila. W. & B. R. R. Co., 34 Md. 532; P. C. & St. L. Ry. Co. v. Nuzum, 60 Ind. 533; Pennington v. P. W. & B. R. R. Co., 18 A. & E. R. R. Cas. 310; N. Y., L. E. & W. R. Co. v. Bennett, 1 C. C. A. 544; Poulin v. Canadian Pac. R. Co., 52 Fed. 200; S. C., 52 A. & E. R. R. Cas. 188; Bradshaw v. South Boston Railway Co., 135 Mass. 407; Hutchinson on Carriers, 2d Ed., Secs. 575–580j; Wood, Railroad Law, Vol. 3, p. 1939; Elliott, Railroads, Vol. 4, Sec. 1594.

A railroad company as a common carrier has the right to limit the use of tickets to a particular train, a particular day or any particular time. Boston & Lowell R. R. Co. v. Proctor, 1 Allen (Mass.), 267; Hill v. Syracuse, etc., R. R. Co., 63 N. Y. 101; State v. Campbell, 32 N. J. L. 309; Auerback v. New York Cent. R. Co., 89 N. Y. 281, Boise v. Hudson R. R. Co., 61 Barb. 611; Elmore v. Sands, 54 N. Y. 512; Shedd v. T. & B. R. R. Co., 40 Vt. 88; Pier v.

Finch, 24 Barb. 514; Ga. R. Co. v. Bigelow, 68 Ga. 219; Stone v. C. & N. R. R. Co., 47 Ia. 182. Johnson v. Concord R. R. Co., 46 N. H. 213; Keeley v. Boston, etc., R. R. Co., 67 Me. 163; Lillis v. St. L., K. C. & N. R. Co., 64 Mo. 464; Little Rock Ry Co. v. Dean, 21 A. & E. R. R. Cas., 279; Churchill v. C. & A. R. Co., 67 Ill. 390; Wood on Railroad Law, Vol. 3, 1638; Hutchinson on Carriers, 2d Ed., Sec. 575 *et seq.*; Elliott, Railroads, Vol. 4, Sec. 1598. ,

The statement of the ticket agent on December 10, 1893, to Pennington that the ticket which she sold him on November 27, 1893, was good for passage to Kensington did not give Pennington a right to travel on the ticket; first, because the declaration of the ticket agent was made long after the sale of the ticket, and did not constitute a part of the *res gestæ* in selling the ticket to Pennington; and, second, because a ticket agent authorized only to sell tickets of a specified form has no authority, even at the time of sale of such ticket, to enlarge or otherwise alter the terms and provisions of such ticket. Hall v. Memphis and Charleston R. Co., 9. A. & E. R. R. Cas. 348; Boise v. Hudson R. Co., 61 Barb. 611; McClure v. P., W. & B. R. Co., 34 Md. 532; P., C. & St. L. Ry. Co. v. Nuzum, 60 Ind. 533, Johnson v. Concord R. Co., 46 N. H. 213; Keeley v. Boston, etc., R. Co., 67 Me. 163; Shedd v. T. & B. R. R. Co., 40 Vt. 88; Elliott on Railroads, Vol. 1, Secs. 217-18.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 27, 1893, the appellant purchased at the ticket office of the appellee at 36th street station, a ticket from that station to Kensington, but did not go upon the train as he had intended. He kept the ticket and went again to that station December 10, 1893, to take passage, and presented the ticket to the agent who had sold it to him, asking if it was good for the train that day. The answer of the agent was not admitted in evidence, but the act of the agent was a return of the ticket to the appellant, unlocking the turnstile through which only could the appellant go to the train, and the appellant went upon the cars. He had

Pennington v. I. C. R. R. Co.

with him money enough to have bought another ticket, but not enough to pay the fare which must be paid on the car by passengers not having tickets. The conductor put him off at another station, on a very cold night, and the appellant was much injured in health in consequence thereof.

In the absence of any fraud by the appellant—and no fraud is pretended—what was thus done was an acceptance by the company of the appellant as a passenger.

In the regular course of employment, the agent at 36th street had opened the way for him to the train, with that ticket as the evidence that he had paid the company for the right to ride to Kensington. The defense of the company is that the ticket was:

“ Illinois Central R. R.
One Passage Between
Douglas (A)
and
Kensington

On Suburban Trains only. If presented on date of sale
shown on back.

A. H. HANSON, General Ticket Agent,” and was perforated by a stamp cutting little round holes in it, and when held up to the light with the back of the ticket to the observer, the holes were so arranged as to form the figures 331 : 3. Whether such figures meant anything, and, if anything, what, would be to the general run of uninstructed passengers an unsolvable riddle.

“ Date of sale shown on back ” might be indicated to the employes of the company by any cipher of which they had the key. The restriction was not to date of sale simply, but to such date “ shown on back.” The appellant did not understand the effect of these hieroglyphics and went to the agent for guidance, who answered him by turning him to the cars.

We have nothing to do with the duty of the conductor to the company.

The company, through an agent put there to discharge, among other duties, that of accepting passengers, accepted the appellant as a passenger.

The act of the ticket agent, and the act of the conductor, were both acts of the company, and, if by reason of their inconsistency the appellant has suffered, he is entitled to compensation.

The instruction by the court to the jury to find for the defendant was wrong, and the judgment is reversed and the cause remanded.

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C. Stuart Beattie v. The National Bank of Illinois.

1. NEGOTIABLE INSTRUMENTS—*Payment of Drafts—Forged Indorsements.*—The acceptor of a bill of exchange must satisfy himself when it is presented for payment, that the holder traces his title through genuine indorsements; for if there is a forged indorsement it is a nullity and no right passes by it.

2. SAME—*Payment of Drafts to Others Than the True Owner.*—Payment to a holder of a draft under a forged indorsement is invalid as against the true owner. Such owner may require it to be paid again.

3. SAME—*Liability of Indorser.*—An indorser of commercial paper warrants the genuineness of all signatures to such paper and all prior indorsements thereon, and that his title thereto is genuine. He is liable if his title proves defective.

Assumpsit, on a bill of exchange. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

HARRY VINCENT, attorney for appellant.

ARNOLD HEAP, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee before a justice of the peace for the amount of a draft for \$133.25, drawn upon appellee by the First National Bank of Council Bluffs, Iowa, to the order of George A. Bent, and by said Bent indorsed and delivered to appellant, for value, and upon being defeated

Beattie v. National Bank of Illinois.

in said suit, he appealed to the Circuit Court, where, again, upon a trial by the court, judgment went against him, and he now appeals to this court.

The draft and indorsements offered in evidence, were as follows:

“ FIRST NATIONAL BANK,
COUNCIL BLUFFS, IOWA, Sept. 21st, 1891.

No. 224,070. \$133.25.

Pay to the order of Geo. A. Bent one hundred and thirty-three and 25-100 dollars.

A. W. RICKMAN,
Cashier.

To National Bank of Illinois, Chicago, Illinois.”

(Indorsed:) “Geo. A. Bent, for deposit Bank of Commerce, account of C. Stuart Beattie.”

The case was tried in the Circuit Court upon an agreed partial statement of facts, as follows:

“That George P. Bent, of Chicago, Illinois, sent a collection to the First National Bank of Council Bluffs, Iowa, amounting to \$133.50; that said bank made the collection, and in return drew its draft on defendant, National Bank of Illinois, for \$133.25, payable to the order of George A. Bent, Chicago, by error; that draft was mailed to George A. Bent, Chicago, Illinois; that George A. Bent not being the person intended to receive the draft, but an entire stranger to the First National Bank of Council Bluffs, received the draft in question; that George P. Bent was the one intended to be made the payee in the draft in question; that George A. Bent never had any business transactions with the defendant or the Council Bluffs Bank, and the latter bank was never indebted to George A. Bent; that the draft was indorsed to the plaintiff by George A. Bent; that the draft was deposited by the plaintiff for his account in the Bank of Commerce of Chicago; the Bank of Commerce clears through the Union National Bank, Chicago, and the draft was paid by defendant through the Union National Bank. When the draft was returned by defendant to the Council Bluffs Bank it was discovered that George

A. Bent had received the draft intended for George P. Bent; that the First National Bank of Council Bluffs and George P. Bent prepared affidavits, which being attached to the draft, it was returned to defendant, who then returned it to the Union National Bank, who redeemed it under the rules of the Clearing House of Chicago. The Union National Bank presented it to the Bank of Commerce, which latter bank took it up and required plaintiff to make the same good. Plaintiff took the draft to defendant bank and ascertained that defendant had funds of the drawer in its hands sufficient to cover the draft at all times subsequent to its date."

Such stipulated facts, and the draft and indorsements already copied, together with the testimony of appellant and one F. F. Sholl, constituted all the evidence.

The appellant testified: "Am the owner of the draft in question. On Saturday afternoon following the 21st of September, 1891, about 4 o'clock p. m., Beach, who was then a broker with an office in the Chamber of Commerce Building and a client of mine, came to my office with the draft in question indorsed by Geo. A. Bent. Beach informed me that the draft had been given to him by Bent a few minutes before with a request that he, Beach, would get him, Bent, the money for it. Beach further informed me then that he was well acquainted with Bent, having known him three or four years previous to this time at Minneapolis. That Bent was a traveling man and had received this draft as a remittance and desired to leave Chicago that Saturday night, and could not do so unless he could get the draft cashed by some person, as Bent had gotten it from the post office too late for the bank. I gave Beach \$50, being all the currency that I could spare, and made a check on the Bank of Commerce for \$83.25 to the order of George A. Bent, telling Beach where I thought he could get my check cashed that evening, and it was cashed and paid the following Monday. Beach left my office and returned in about five minutes with a gentlemen whom he introduced as Mr. Bent. Mr. Bent said Mr.

Beattie v. National Bank of Illinois.

Beach had told him that I wanted to see him, Bent. I said that I was pleased to see him, but had no interest in him beyond the fact that I had cashed a draft made to his order and hoped it was all right. Bent took from his pocket a stamped envelope bearing the card of First National Bank of Council Bluffs, Iowa, printed upon it and addressed to George A. Bent, Chicago, Illinois, with no other address, and said, "Its all right, Mr. Beattie, this is the envelope in which the bank sent me the draft, and here is the letter with it." Mr. Bent took a letter from the envelope, opened it and offered it to me. I saw that it was upon a letter-head of the First National Bank of Council Bluffs, Iowa, but did not go into the matter any deeper, assuring him that there was no question about the matter in my mind, and after some general conversation, which I do not remember, he and Beach left my office together. On Monday morning I deposited the draft in the Bank of Commerce, which credited it to my account conditionally subject to its future payment, and I heard nothing more of the matter until about the 20th of October, 1891. The Bank of Commerce advised me that it had charged against my account the amount of this draft, it having been returned under the Clearing House rules for an alleged forged indorsement. The same day the Bank of Commerce delivered the draft to me, and also an affidavit which accompanied the draft in the words and figures following, to wit:

"State of Iowa, }
Pottawottamie County. } ss.

COUNCIL BLUFFS, Iowa, October 16, 1891.

A. T. Rice, assistant cashier of the First National Bank, deposes and says that on September 15, 1891, the First National Bank of Council Bluffs, Iowa, received from Geo. P. Bent, No. 223 Canal street, Chicago, Illinois, for collection, a note made by Max Bourneus for one hundred and thirty-three and 50-100 dollars (\$133.50), and due September 27 and 30, 1891. That on September 21, 1891, this note was paid and on the same date the First National Bank made its draft No. 224,070 for \$133.25, exchange 25 cents, in pay-

ment of said note, on Nat'l Bank of Illinois, Chicago, Ill., to the order of George A. Bent, which was paid by Nat'l Bank of Illinois, on September 28, 1891, and that the name of Geo. A. Bent was written in error, and that Geo. A. Bent has unlawfully appropriated said draft to his own use and received the proceeds thereof."

The George P. Bent referred to in this affidavit was at the time of the making of the draft, and had been a great many years previous to that time, a large manufacturer of pianos and organs, with a factory on Canal street, and his number 223 Canal street.

Said F. F. Sholl testified: "Am superintendent of the city delivery of the post office in the city of Chicago, and know of the course of business of that office, in year 1891, which was the same as it is at the present time regarding the receipt and delivery of mail matter. A letter mailed at Council Bluffs, Iowa, addressed to George A. Bent, Chicago, Illinois, without any further direction, would go first to the directory department, where examiners would seek to locate the address of George A. Bent; if that address could not be located in the directory, the letter would go immediately to the general delivery. A letter addressed to George A. Bent, 223 South Canal street, Chicago, would be delivered at that number by the carrier, although the person there had a different middle initial. A letter addressed to George P. Bent, without further or other directions, would have been delivered to the address of George P. Bent, if known or shown in the directory. A letter going to the general delivery addressed to George A. Bent would be delivered to any person claiming that name and calling for mail matter."

There being no question about the facts, there arises upon this record, practically but a single question of law, and such question is as to the liability of the appellee to the appellant. That question must be decided against the appellant. 2 Daniel on Negotiable Inst., Sec. 1225, says:

"The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for if there

Beattie v. National Bank of Illinois.

is a forged indorsement, it is a nullity and no right passes by it, and payment to a holder under a forged indorsement would be invalid as against the true owner who might require it to be paid again." Smith v. Chester, 1 Term R. 654; Canal Bank v. Bank of Albany, 1 Hill, 287; Goddard v. Merchants Bank, 2 Sandf. 247. * * *

"The payer should also satisfy himself of the identity of the holder; for he can not defend himself against the real payee by showing that he paid the amount of the bill or note to another person of the same name in good faith, and in the usual course of business." Graves v. American Exchange Bank, 17 N. Y. 205.

The same author, Vol. 1, Sec. 672, says:

"The indorser contracts that the bill or note is in every respect genuine, and neither forged, fictitious or altered," and cites a large number of authorities.

"The indorser also warrants the genuineness of all the signatures to the paper. * * * Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective; and since no title passes on a forged indorsement, it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements." Tiedeman on Commercial Paper, Sec. 259; see, also, Chambers v. Union Nat. Bk., 78 Pa. St. 205; and Graves v. Am. Ex. Bk., *supra*.

According to the foregoing authorities, it is clear that if appellant had not taken up the draft he would have been liable to the appellee upon his indorsement, and that being so, he can not recover of the appellee, upon paper to which he has no lawful title. The fatal defect in appellant's case is that, under the evidence, he is not the lawful owner of the draft.

The question strongly insisted upon by appellant, as to who shall suffer for the negligence of the drawer, does not appear to us to be in this case.

No matter how great the negligence of the drawer, the Council Bluffs Bank, there seems to have been none on the part of the appellee.

The judgment will be affirmed.

D. G. Ballard v. City of Chicago.

1. **CITIES AND VILLAGES—Power to License Trades, Professions, etc.—Taxes.**—When authorized by the legislature, city councils may impose licenses upon trades, professions, pursuits and callings and such impositions do not constitute a tax in the constitutional sense of the word.

2. **SAME—Licensing Stationary Engineers.**—The court holds the ordinance of the city of Chicago entitled "An ordinance for the examination and licensing of engineers of steam machinery and steam boilers in the city of Chicago" (passed July 6, 1892), valid, reasonable in its possessions and uniform in its application.

3. **ERRORS—Of Which the Appellant Can Not Complain.**—The impositions of a less fine than the law requires in a case where the only punishment is a fine, is not prejudicial to the person fined.

Debt, for the violation of an ordinance. Appeal from the Criminal Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

SULLIVAN & McARDLE and P. L. McARDLE, attorneys for appellant.

Although a license is not a tax still it is sometimes a source of revenue, and if this ordinance provides for a revenue it is invalid. *Wiggins v. East St. Louis*, 102 Ill. 560.

WILLIAM H. TATGE, FRANKLIN A. DENISON and OSCAR HEBEL, attorneys for appellee.

A license fee imposed by an ordinance, passed by the city council of cities, is not a tax, and it has been so held in the following cases: *City of East St. Louis v. Wehrung*, 46 Ill. 392; *Cole v. Hall, collector*, 103 Ill. 30; *Braun v. City of Chicago*, 110 Ill. 186.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of a fine of ten dollars imposed upon the appellant for a violation of the city ordinances concerning the licensing of engineers operating stationary steam engines within the city of Chicago.

Ballard v. City of Chicago.

The case was submitted to the court, without a jury, upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed, by and between the parties to the above entitled cause, by their respective attorneys, that the following stipulation may be filed as an agreed statement of the facts in this cause. The defendant, D. G. Ballard, is a citizen of the city of Chicago, county of Cook, and State of Illinois; he is by trade an engineer, operating a stationary engine, and has been such for over twenty years. He presented himself, and was examined by the board of engineers in the said city of Chicago, in accordance with the requirements of an ordinance for the examination and licensing engineers in charge of steam machinery and steam boilers in the city of Chicago, passed April 3, 1890, and an amendment to said ordinance, dated July 6, A. D. 1892. On or about the 26th day of March, A. D. 1891, a license was issued by the said board of examiners to the defendant, certifying his qualifications as an engineer. That each year thereafter, up to March 26, 1895, said license, or certificate to the defendant, was renewed by said board. The last license issued to the defendant was dated March 26, 1895, and by its terms ceased to be operative on the 28th day of March, A. D. 1896. All of said licenses were in the form, a copy of which is attached to this stipulation, and marked Exhibit "A." The defendant for each of the said licenses issued to him as aforesaid paid to said board the sum of \$2, said sum of \$2 being paid upon the renewal of said license. None of said certificates or licenses were or had been revoked. At the time this suit was commenced, on or about July 1, 1896, the defendant was engaged in his said trade or calling of an engineer; was in active charge of a stationary steam engine. The defendant did not then have a renewal of the license or certificate purporting to expire on the 26th day of March 1896, but refused to renew said license, stating at the time to an officer of said board that he had paid the last \$2, he would ever pay the city, that he believed the law was not constitutional. The board of engineers would not grant a renewal of the license without the payment of the fee of \$2.

That on the day the above suit was started, the defendant had no license except the one granted to him by the said board of engineers on the 26th day of March, A. D. 1895. This statement contains all the facts of said case and all the evidence except such ordinances as may be offered by either party."

The following are the abstracted portions of the ordinances that were offered in evidence by the appellee, except section one, which we set in full:

"Ordinance passed April 3, 1890.

Section 1. There shall be appointed by the mayor, with the consent of the council, a board of examiners (which shall consist of three members), of competent and practical engineers, good judges of construction of steam boilers and engines generally, and experienced in their operation and uses, whose duty it shall be to examine each applicant, in pursuance of rules and regulations of the ordinances, and if the applicant is found qualified the examining engineers shall sign a certificate of qualifications, which shall be delivered to such applicant, such certificate to expire one year from the date of issue.

Sec. 7. Board of Examiners to keep books, with names, etc., of all applicants, full amount of money received and that returned on rejected applications, to be balanced daily and result to be deposited daily with city comptroller.

Amended ordinance passed July 6, 1892.

Sec. 2. Board shall be furnished with quarters by commissioner of public works; shall hold daily sessions of such duration as may be deemed requisite, between the hours of 9 A. M. and 10 P. M. for the purpose of examining and determining the qualifications of applicants for licenses.

Sec. 3. The Board of Examiners, or a majority thereof, shall have power to examine into the qualifications of applicants to grant licenses, and, for cause, to suspend or revoke the same. Every application for a license must be made on the printed blanks furnished by the Board of Examiners, and that for an engineer must be accompanied by a fee of two (\$2) dollars and that for a boiler or water tender must be accompanied by a fee of one (\$1) dollar.

Ballard v. City of Chicago.

, Sec. 4. Prescribes qualifications required of applicant.

Sec. 5. Empowers board to suspend or revoke license for certain causes.

Sec. 6. License shall be signed by majority of board.

Sec. 8. Provides for punishment of any member of board favoring any applicant and of any applicant who shall attempt to procure favors by unlawful means.

Sec. 9. No steam engine or boiler subject to the provisions of this ordinance shall be used, managed or operated in the city of Chicago, except by an engineer or boiler or water tender as provided herein, and who shall have been duly licensed as provided herein, and who shall have and exhibit a certificate thereof. Any person who shall take charge of or manage or operate any steam engine or boiler, or any portion of a steam plant in the city of Chicago without a proper and valid license, as provided by this ordinance, shall, for each and every offense, be subject to a fine of not less than twenty dollars nor more than fifty dollars, and any person, agent, firm, company or corporation owning or controlling any steam engine, boiler or other steam plant, who shall authorize or permit any person or persons without a proper and valid license as required herein to take charge of or to manage or to operate any steam engine or boiler or any portion of a steam plant, shall, for each and every offense, be subject to a fine of not less than fifty dollars nor more than two hundred dollars, and each day's violation of the terms of this ordinance, or any of them, shall constitute a separate offense.

Sec. 10. Every plant in city of Chicago, must have a licensed engineer, whose qualifications shall be displayed in conspicuous place in the boiler room.

Sec. 11. Every engineer must make written report to board of examiners, in January and July each year, of condition of boilers or steam apparatus he is in charge of.

Sec. 12. Exempts engineers in charge of locomotives and boilers for heating private dwellings from operation of ordinance.

Sec. 13. Provides for paying salaries of officers of board

out of amount received in license fees, all balances to be paid over to the city of Chicago. Salary of secretary of board, to be \$1,700 per year; each of the others \$1,500.

Which was all the evidence offered or received on behalf of either party in above entitled cause."

Such ordinances were passed by the city council in pursuance of the power granted by the State, by an act entitled, "an act to insure the better protection of life and property from steam boiler explosions," approved June 3, 1889, (Hurd's Rev. Stat., 1895, Chap. 24, Secs. 439 and 440); and from a reading of said act it can not be doubted that the ordinances were within the power of the city council to adopt. Said section 439 expressly provides for the examination, licensing and regulation of stationary engineers by city councils, and for fixing "the amount, terms and manner of issuing licenses to such persons," and for making it unlawful for them to exercise their avocation without a license, and for providing a punishment for a breach of such provisions.

Various propositions of law to be held by the Criminal Court were submitted by the appellant, but were all refused. Those that are principally urged upon our consideration, are that the ordinance itself nowhere requires the payment of more than one license fee, his previous license never having been revoked; and that if the ordinance does require an annual payment of two dollars, it is invalid, because the city council had no power to raise a revenue in that way, no such power having been delegated to it.

It is among the agreed facts that the appellant presented himself to, and was examined by the Board of Engineers, and received his license, in 1891, and that each year thereafter, up to and including the year 1895, his license was renewed, and that for each of said licenses he paid the sum of two dollars, and that each license so issued to him was for the term of one year from its date, unless sooner revoked, and that none of said licenses were revoked.

The ordinance expressly provides that the certificate that shall issue to an applicant shall expire one year from its

Ballard v. City of Chicago.

date of issue. It then becomes necessary for one who would continue to practice his profession as an engineer to again apply for a renewal of his license for another year, and the ordinance requires that such renewed application must be accompanied by a fee of two dollars. This fee the appellant refused to pay in 1896, and he obtained no new license, and the fine in question was imposed because he was actively engaged as an engineer without having a license.

The term for which appellant's last license was issued having expired, there was no need for the city to revoke it in order to render appellant subject to prosecution. Section 9 of the ordinance expressly provides that any person who shall operate a steam engine without a license shall be subject to fine; and appellant having no license that was in force, his having expired by its own limitation, and he having refused to renew it, he was properly held to be subject to fine.

We see nothing in the record to justify the argument that is attempted in appellant's behalf, that the ordinance is invalid if it requires the payment of two dollars annually, because the city council had no power to pass a law for the purpose of raising revenue in such a way.

There does not seem to be in the ordinance any attempt to provide for revenue or for a source of revenue.

The object on the part of both the State and the city is the commendable one of affording protection to life and property.

When authorized by the legislature, city councils may impose licenses upon trades, professions, pursuits and callings, and such impositions do not constitute a tax in the constitutional sense of that word. *Braun v. City of Chicago*, 110 Ill. 186; *Cole v. Hall*, 103 Ill. 30.

The ordinance in question is a reasonable one, and is uniform in its application to all engineers of the class of appellant. One year is a reasonable time for the duration of a license, and is the usual one, and two dollars is a reasonable sum for the fee.

It is reasonably apparent that the fee required is no more

than sufficient to maintain the system adopted by the ordinance and to make it effectual, and that it is not a source of revenue to the city either actual or intended.

Appellant asks: "Why not two dollars each half year, or each month?" The answer is to be had in asking whether such would or not be reasonable. He insists that the one payment of two dollars shall cover the period of an engineer's lifetime, and would have us so say. While the record does not contain facts to base an opinion upon in that record, we are impressed that such a fee would be wholly inadequate to maintain a system of so much importance to the safety of persons and property in a great and industrious city.

The system and the intention of the law is in the direction of safety to life and property, and the ordinance and regulations being lawful, reasonable and uniform, should be upheld.

The appellant urges that the judgment is a nullity because the fine was for but ten dollars, when, by the ordinance, the minimum prescribed fine is twenty dollars.

The imposition of a less fine than the law requires, in a case where the only punishment is a fine, is not prejudicial to the appellant. *Harrod v. Dinsmore*, 127 Ind. 338.

Upon the record, we think the ordinance is valid, and that appellant was clearly guilty of a violation of it, and that the judgment should be affirmed.

Auburn Cycle Company v. James Foote.

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I. NOTICE—*Method of Service*.—When a statute requires notice and the method of service is not laid down, it is understood that there shall be personal service.

2. SAME—*Irregularity in Service of, Waived*.—Irregularities in the service of a notice on legal proceedings may be waived by an appearance and filing affidavits in the case.

8. TRIALS—*Proceedings at, How Preserved*.—What accrues in the presence and hearing of a trial judge, can be brought to the attention

Auburn Cycle Co. v. Foote.

of an Appellate Court, only by the certificate of the judge, that such things did take place.

4. VERDICTS—*Sufficiency of Affidavits on Motions to Set Aside.*—A party against whom a verdict has been reached in his absence, should, upon an application to set it aside, show, by setting out the facts, that he has a meritorious defense or cause of action.

5. CORPORATIONS—*Denial of Corporate Existence.*—The fact that a defendant has held itself out as a corporation to persons dealing with it is sufficient to make out a *prima facie* case of corporate existence.

6. APPEALS—*From Justices—Practice.*—When an appeal from a justice of the peace is taken by the defendant, it is not necessary for the plaintiff to summon him into the court to which the appeal is taken. The filing of the transcript brings him into court.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

MAPLEDORAM & DUFFY, attorneys for appellant.

KNIGHT & WAGNER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case, begun before a justice of the peace, judgment being there rendered against the defendant, it took an appeal to the Superior Court.

October 27, 1896, the plaintiff filed the justice's transcript, and November 25th an affidavit and notice to place the cause upon the short cause calendar. The affidavit of service of said notice was as follows:

“State of Illinois, Cook County: Wm. R. Wagner, being duly sworn, deposes and says that he served the within notice by leaving a copy of the same at the office of Mapledoram & Duffy the 25th day of November, 1896.

Wm. R. WAGNER.

Subscribed and sworn to before me, this 25th day of November, 1896.

STEPHEN D. GRIFFIN, Clerk.”

December 12th the defendant filed an affidavit denying that it was, when suit was begun, or is, a corporation, and

VOL. 69.]Auburn Cycle Co. v. Foote.

stating that it is a partnership doing business under the name of "Auburn Cycle Company," giving the names of the partners.

December 21st, the case was called for trial upon the short cause calendar of Judge Goggin. Whereupon the defendant at once moved to strike the cause from such calendar, because, *inter alia*, the affidavit of service of notice did not show service in accordance with Rule 12 of said court. Rule 12 is as follows:

"Rule 12. Notice to the opposite party must be in writing, state the motion, designate the judge before whom the same is to be made and the place of hearing, and be served by delivering a copy to such party, or his attorney of record, before 4 p. m. of the day preceding the day mentioned in the notice for calling up such motion.

The service of a motion upon an attorney by leaving a copy thereof at his office, in his absence, with a clerk or other person in charge of such office, shall be regarded as a service upon such attorney."

Which motion was overruled, and a trial immediately had with the result of a verdict and judgment against the defendant for \$186.

The short cause calendar statute provides for ten days' notice to the defendant, his agent or attorney.

Where a statute requires notice and the method of service is not laid down, it is understood that there shall be personal service. Wade on Notice, Secs. 1334, 1335.

Whether by a rule of court the necessity for personal service can be dispensed with, and whether Rule 12 is applicable to a notice to place upon the short cause calendar, which notice does not require the making of a motion or an appearance in court, are questions which not being presented by counsel, we do not feel called upon to decide.

Under neither statute nor rule of court does the affidavit show service of notice.

The writer of this opinion is inclined to think that for this reason the cause should have been stricken from the short cause calendar; a majority of the court hold that the

Auburn Cycle Co. v. Foote.

defendant by the affidavit denying that it was a corporation, filed seventeen days after the filing of the affidavit of service of notice, the “irregularity” in the service was waived, following, it is said, the rulings in: Treftz v. Stahl, 46 Ill. App. 462; Stewart v. Carbray, 59 Ill. App. 397, and Johnston v. Brown, 51 Ill. App. 549.

While the defendant did not deny that its attorneys received or duly learned in apt time of the “notice,” a minority of the court is of the opinion that there was not an irregular service, but none at all.

Upon a motion for a new trial, the defendant filed affidavits setting forth what occurred in court immediately before and during the trial. These affidavits are included in the bill of exceptions. What occurs in the presence and hearing of a trial judge can be brought to the attention of this court upon appeal only by the certificate of the judge that such things did take place. The judge has not certified that the affidavits are true, but merely that they were filed; they thus show to us that on the motion for a new trial certain things were by affidavit represented to the court.

By the bill of exceptions it appears that the evidence for the plaintiff was very brief; that there was no cross-examination of witnesses and no evidence on behalf of the defendant.

It appears to have been an *ex parte* trial, and it is probable that under some misapprehension, the attorney for the defendant was, as is stated in the affidavits, not present at the trial, while the witnesses for the defendant were.

Courts prefer, in all instances, to have both parties present at hearings, that there may be a full and a fair trial; nevertheless the rule is not unreasonable or unjust which requires that one against whom a verdict has, in his absence been reached, should, upon application to set it aside, show, by a setting out of facts, that he has a meritorious defense or cause of action.

The affidavits filed by the defendant contain, as to this, the mere statement that it has a meritorious defense; a conclusion which may or may not be justified by the facts. The

VOL. 69.] Luxen v. Chicago & Grand Trunk Ry. Co.

testimony at the trial had been reported, and the defendant could easily have set forth the facts, if any there be, showing that it has a meritorious defense. Had it done so, it is quite likely the court would have, upon terms, awarded a new trial.

It is urged that there was no evidence showing that the defendant is a corporation.

The defendant as a corporation filed an appeal bond upon its appeal to the Superior Court, the defendant also appeared in the Superior Court and moved to strike the cause from the short cause calendar. The testimony at the trial shows a holding out by the defendant that it is a corporation, by dealing, and purchasing goods as such.

This made a *prima facie* case. Gerlinger Co. v. Labadie 41 Ill. App. 283; Wheatley et al. v. Chicago Trust & Savings Bank, 64 Ill. App. 612-615.

The appeal from the justice of the peace having been taken by the defendant, it was not necessary that the plaintiff summon it into the Superior Court; it was there as soon as the transcript was filed.

The judgment of the Superior Court is affirmed.

Christ Luxen v. Chicago & Grand Trunk Ry. Co.

1. EVIDENCE—*Existence and Sufficiency of, Questions for the Court and Jury.*—The sufficiency of testimony to prove an allegation is a question for the jury; but whether there is any evidence tending to prove such allegation is a question of law for the court.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

CASE & HOGAN, attorneys for appellant.

RUNNELLS & BURRY, attorneys for appellee.

Metropolitan Life Ins. Co. v. Quandt.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant worked for the appellee at a circular saw, partly inclosed on the lower side by a box in which sawdust would collect, which it was the duty of the boy to remove, and which duty the boy had neglected. While the saw was running—though the appellant had, as he supposed, taken the proper step to stop it—the appellant undertook to remove the sawdust by putting his hand into the box. In so doing he struck the saw and his fingers were cut off. He sues the appellee upon the theory that the neglect by the boy was the cause of the accumulation of sawdust which was the cause of the inconvenience which caused the appellant to attempt the removal of that sawdust, and therefore that neglect by the boy, not a fellow-servant of the appellant, is enough to entitle him to recover from the appellee damages for the loss of his fingers.

A cause which is no cause at all, is not a proximate cause. Had the appellant stopped the saw, or had he kept his hand out of the box, the neglect by the boy would have done him no harm.

It is true that the sufficiency of testimony to prove an allegation, is a question for the jury; but whether there be any evidence tending to prove such allegation is a question of law for the court to decide. Poleman v. Johnson, 84 Ill. 269.

There is no proof tending to show that negligence by the appellee was the cause of the injury to the appellant.

The direction to the jury to find for the defendant was right, and the judgment is affirmed.

Metropolitan Life Insurance Co. v. Caroline Quandt.

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1. INSURANCE—*Waiver of Conditions*.—A provision of a policy of life insurance, that it should be void in case the insured was not in sound health at the time of its issuance, is waived by a collection of premiums thereon after knowledge by an agent of the insurance company, having authority to deliver policies and collect premiums.

2. **SAME—Question of Insurable Interest—When to be Raised.**—The objection that a beneficiary in a policy of life insurance has no insurable interest in the life of the person insured must be raised in the court below; it comes too late when raised for the first time in the Appellate Court.

3. **WRITTEN INSTRUMENTS—Secondary Evidence of the Contents of—Notice.**—An action on a policy of insurance is notice to the company to produce the application, and a statement by counsel for the company on the trial that such application is not in his possession is sufficient to entitle the opposite party to give secondary evidence of it.

Assumpsit on a policy of insurance. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellant, contended that even if it be true that the agent knew of the illness of the insured when he delivered the policy and received the premium, this would not operate as a waiver by the company of the clause exempting the company from liability unless the insured was in sound health on the date of the policy. This clause is not like a representation that the insured was in sound health. Although a policy may be issued upon the faith of representations, they form no part of the contract, but are collateral to the contract. Where the defense is that a representation was false, the gist of the defense is that the insurance company was induced by fraud to enter into the contract. Evidence showing that the insurance company knew the representation to be false, therefore, does not contradict the policy, but only proves that the company was not, in fact, deceived, and therefore could not cancel the policy on the ground of fraud. But the clause in question forms a part of the contract, and to hold that it was waived is to change the contract. This is a palpable violation of the rule that a written agreement can not be contradicted or altered by parol testimony. *Barrett v. U. M. F. Ins. Co.*, 7 Cush. 175; *Mensing v. The Amer. Ins. Co.*, 36 Mo. App. 602.

CHARLES WERNO, attorney for appellee, contended that conditions like those under consideration are inserted in the

Metropolitan Life Ins. Co. v. Quandt.

policy for the benefit and protection of the insurer, and may be waived, either before or after breach thereof; and when the agent of the company, through whom it must act in dealing with the public, knowing of the right of forfeiture, permits the assured to pay the premium to the company, he relying on his policy as valid and subsisting, the company will be held to have waived the condition. It would be grossly inequitable to permit the company to receive the premium from an assured who was induced thereby to rely upon his policy for indemnity and then insist upon a forfeiture from facts known by it to exist when the premium was paid. This we understand to be the rule laid down by text writers and supported by the adjudicated cases. *Mutual Life Ins. Co. v. Amerman*, 119 Ill. 335; *Atlantic Ins. Co. v. Wright*, 22 Ill. 463; *Commercial Ins. Co. v. Ives*, 56 Ill. 406; *Germania Ins. Co. v. McKee*, 94 Ill. 498; *Andes Ins. Co. v. Shipman*, 77 Ill. 189; *Teutonia L. Ins. Co. v. Anderson*, 77 Ill. 384; *Germania L. Ins. Co. v. Koehler*, 63 Ill. App. 83; *Phoenix Ins. Co. v. Hart*, 149 Ill. 513.

The provision may itself be waived, by the agent, and it is necessary to prove an express agreement, to waive in such case, but it may be inferred from the acts and conduct of the insurer. *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 184; *Hilt v. Met. L. Ins. Co. (Mich.)*, 68 N. W. Rep. 300.

The appellant is an insurance company organized under the laws of the State of New York, and has its home office in New York City, and is doing business in this State under and by virtue of our statute in relation to life insurance companies. Section 193, chapter 73, Starr & Curtis' Statutes (2d Ed.), provides that:

“Whoever solicits insurance on behalf of any life company not chartered by and established within this State, or transmits for any person other than himself an application for life insurance to or from such company, or advertises that he will receive or transmit the same, shall be held to be an agent of such company to all intents and purposes and subject to all the duties, requisitions, liabilities and penalties set forth in the laws of this State relating to life insurance companies not incorporated by the legislature thereof.”

VOL. 69.] Metropolitan Life Ins. Co. v. Quandt.

This statute is passed on in several Illinois cases which show conclusively that it is applicable to the case at bar, and that Fletcher was an agent of the defendant company to all intents and purposes (his acts therefore being the acts of the company), and that all persons with whom he had dealings for the company had the right to so regard him. Mich. Mutual Life Ins. Co. v. Hall, 60 Ill. App. 159; Continental Life Ins. Co. v. Ruckman, 127 Ill. 364; May on Insurance, Par. 144.

The insured had a perfect right to take out a policy on his own life for his mother's benefit and she even had a right to advance him the necessary means to do so. *Etna Life Ins. Co. v. France*, 94 U. S. 561.

What is an insurable interest has been defined as follows:

"Any interest, whether pecuniary or arising from dependence or natural affection in the life of the person insured, constitutes an insurable interest." *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 619.

In determining whether a parent has an insurable interest in a child, or a child in the life of a parent, the courts have held that mere relationship does not constitute an insurable interest, when the other facts and circumstances tend to show that the policy was a mere wager policy or speculation, and that the claimant has no interest whatever in the life of the insured; but when the facts and circumstances tend to show that the policy was not a speculation or wager policy, then mere relationship is sufficient to support a policy on the life of a son in favor of the mother, and on the life of a brother in favor of a sister. *Reif v. U. M. L. Ins. Co.* (Sup. Ct., Cincinnati), 17 Ins. Chronicle, 3; *Etna Life Ins. Co. v. France*, 94 U. S. 561; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 461; *Loomis, Adm'r, v. Eagle, etc., Ins. Co.*, 6 Gray (Mass.), 396; *Kane v. Reserve M. L. Ins. Co.*, 81 Pa. 154; *Lord v. Dall*, 12 Mass. 115.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
This is an action upon a policy of life insurance issued

Metropolitan Life Ins. Co. v. Quandt.

by the appellant upon the life of John W. R. Quandt, who was the son of the appellee.

There is but one question in the case which touches the real merits.

John was between seventeen and eighteen years of age, and was examined by a physician for the appellant about three weeks before the policy was issued. He was then in good health, and the fair inference from the evidence is that the physician then wrote an application for insurance on the life of the boy, payable in case of his death to the appellee.

The appellant is a New York corporation, and the course of business was that applications for insurance were sent to the appellant there, which, if it accepted the risk, sent the policy to its "superintendent" here. Under him was an agent who solicited insurance, delivered policies, and collected premiums. In accordance with the usual course of business, that agent carried the policy sued upon to the appellee, received from her the premium, and delivered to her the policy.

The boy was then sick, and she so told the agent, but he left the policy and took the premium.

There is nothing in the case to excite suspicion that there was then any apprehension of danger, though a physician had been called to attend the boy two or three times, and in five days thereafter he died.

Whether insurance is life or fire does not affect the extent to which a company is bound by the conduct of its agents. *Mutual Life Ins. Co. v. Amerman*, 119 Ill. 329.

In *N. E. Fire & M. Ins. Co. v. Schettler*, 38 Ill. 166, and in *Aetna Ins. Co. v. Maguire*, 51 Ill. 342, may be found some very vigorous and instructive language upon that branch of the law.

The only agent of the appellant with whom appellee had any actual dealing was the one who delivered to her the policy and received from her the premium. With him she had like dealing on a policy on the life of her husband. She could not read English, and had no reason to doubt the

VOL. 69.]Matthei v. Wooley.

extent of his authority. We regard his knowledge of the health of the boy as estopping the appellant to insist upon the language of the policy relieving the company from obligation unless at the date of the policy the boy was "in sound health." She acted in good faith; if the agent was too eager for business she had no notice of it.

The objection now made that she had no insurable interest in the life of her son—if ever available—comes too late. The record does not show that in terms it was specifically alluded to below. It was not among the reasons upon which a new trial was asked, nor is it here assigned as error. Hafner v. Herron, 60 Ill. App. 592; Nat. Bk. Ill. v. Baker, 58 Ill. App. 343; Opaque Cloth Shade Co. v. Vheight, 161 Ill. 337.

And she has such interest. May on Ins., Sec. 107.

That in the application she was named as the payee of the policy, is very vaguely proved by the testimony of the appellee; but the application went into the possession of the appellant, and was made the basis of some pleas by it.

The action was notice to the appellant to produce the application. Continental Life Ins. Co. v. Rogers, 19 Ill. App. 580.

When counsel for appellant said on the trial that it was not in his possession, the appellee was entitled to give secondary evidence of it, which evidence the appellant might easily have refuted if it was not true. The evidence so given became strong by the absence of any contradiction. P., Ft. W. & C. Ry. v. Callaghan, 50 Ill. App. 676.

If the illness of the boy when the policy was delivered be not a just defense, it is inequitable for the appellant to attempt any other.

The judgment is affirmed.

Louis Matthei v. Ernest Wooley.

1. MEDICAL PRACTICE—*Who are Physicians.*—A person who treats, operates on, or prescribes for any physical ailment must be regarded as practicing medicine, within the meaning of chapter 91, R. S., entitled "Medicine and Surgery."

Matthei v. Wooley.

2. SAME—*Persons Holding Themselves out as Doctors.*—If by treating, operating on, or prescribing for physical ailments, a person holds himself out as a doctor to persons employing him, and they believe him to be a doctor, he will be chargeable as such.

Action, for medical malpractice. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

RUNYAN & RUNYAN, attorneys for appellant.

FRANK W. BLAIR, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

There was a conflict of evidence on the trial of this case; abundance on either side to win on.

The jury settled that conflict in favor of the appellee, and any review of it would serve only to prove that the conclusion of the jury can not be set aside.

The appellee sued the appellant for the ill consequences to the appellee by the malpractice of the appellant as a physician and surgeon.

The appellant is a druggist. According to the evidence on the part of the appellee, he thought the appellant was also a doctor, and went to him with a hurt finger, which the appellant treated wrongly for ten days, the result of which was inability for a long time to work, and finally amputation of the finger.

If the appellant did in fact “treat, operate on, or prescribe for any physical ailment of” the appellee, the statute regards him as “practicing medicine,” within the meaning of Ch. 91, R. S.

If by so doing he held himself out to the appellee as a doctor, and the appellee believed the appellant to be a doctor, then he is chargeable in that character. McNevins v. Lowe, 40 Ill. 209.

The only question argued is the sufficiency of the evidence, and we can only affirm the judgment, which is done.

MR. JUSTICE WATERMAN dissents.

Hermanus T. G. Rack v. Chicago City Railway Co.

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1. **STREET RAILROADS—Care Required of, for Safety of Persons on Streets.**—Persons in charge of electric cars in passing along public streets are bound to have regard for the rights and safety of others, but are not obliged to be all the while upon guard against the not reasonably to be expected, the unusual and the extraordinary.

2. **NEGLIGENCE—Question of, When to be Submitted to the Jury.**—So long as reasonable minds might differ as to whether the facts shown constitute negligence, the question of whether there was negligence must be submitted to the jury.

3. **SAME—Speed of Cars, in the Absence of Ordinances.**—In the absence of an ordinance upon the subject, running cars through the streets of a city at the rate of twelve miles per hour, is not of itself alone, negligence.

4. **ELECTRIC CARS—Duty of the Gripman.**—It is the duty of a gripman to run his car with reference to the intentions of others, of which he has notice.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

This was an action to recover damages against the Chicago City Railway Company, on account of personal injuries sustained by the plaintiff, Hermanus Rack, a boy then about four years and seven months old. The accident occurred in August, 1893, near the crossing of Fifty-fifth street and Kimbark avenue, in the city of Chicago. The defendant's cable trains at that point run east and west on Fifty-fifth street. Plaintiff, in company with another small boy, was first seen by the gripman of the cable train, which was approaching from the east, standing in the roadway of Fifty-fifth street, south of the east bound track, two or three feet from the curb. At that time the grip-car was from 130 to 160 feet away. The distance from the curb to the east-bound track was estimated at twelve feet. The cable train was then traveling twelve miles an hour. See-

Rack v. Chicago City Ry. Co.

ing the children in that position the gripman reduced the speed of his train to about ten miles an hour, then started it up again. When the grip-car was about thirty or forty feet away the plaintiff started to run directly north across the street, and in front of the approaching train. One witness testified that he reached the track and fell down when the cable car was still twenty or thirty feet away; others said he ran directly in front of the train and was knocked down. One of his feet was crushed so that about a third of it had to be amputated, leaving a stump. After striking the child the train moved thirty or thirty-five feet before it came to a stop. Witnesses differed widely as to the spot where the accident happened. One said it was on the west cross-walk, others that it was eight, forty or one hundred feet west of the west cross-walk.

At the close of all the evidence, on defendant's motion, the court instructed the jury to find the defendant not guilty. Motion for a new trial was made and denied, and judgment was entered on the verdict. From which judgment this appeal is taken.

BURNHAM & BALDWIN, attorneys for appellant.

W. J. HYNES and H. H. MARTIN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

As is well stated by counsel for appellant, "So long as reasonable minds might differ as to whether the facts shown constitute negligence," the question of whether there was negligence must be submitted to the jury.

It appeared by the evidence that upon the day of the accident the track was wet and slippery; that when the track is dry a train can not be stopped in a distance of less than sixty feet; that when the track is wet, it takes a greater distance.

There was nothing tending to contradict the testimony of the gripman, that as soon as the plaintiff started to run

across the street he did all that was possible to stop his train and avoid the accident.

It is urged that running a car through a city street at a speed of from ten to twelve miles an hour, is itself negligence.

We are of the opinion that traveling at a speed no greater than is permitted by law, can not be said to be, by itself alone, negligence.

Running cars through the streets of a city is necessarily fraught with danger. Railroad men insist, with how much truth we can not say, that more accidents will occur from a train running at four miles an hour than from one run at four times that speed. However this may be, we regard it as the business of the municipal authorities to determine at what rate of speed cars may be run, and that the simple fact of proceeding at a rate of twelve miles an hour can not be held to be negligence.

Was it, then, negligence to proceed at ten miles per hour with the knowledge that the plaintiff was standing within two or three feet of the curb, and without anything indicating that he was about to cross the street?

If it be, then it would seem that the presence of young children upon the sidewalk would require that the speed of the car be reduced so that if, in obedience to a childish impulse, they started to run across the street, the car could be stopped ere they reached the track.

The accident in the present case did not happen upon a crossing; yet it is true, as is urged by appellant, that if the gripman, when he first saw the boys standing by the curb with apparently no intention of crossing the street, had checked the speed of his car to the extent he could have done, the accident would probably not have happened.

Was he bound to do this? Under the present city ordinances, we think not.

All adults are bound to exercise ordinary care; under some circumstances extreme care. One passing in a lawful manner upon a public street is bound to have regard for the rights and safety of others; but he is not obliged to

Pioneer Fireproof Construction Co. v. Hansen.

be all the while upon his guard against the not reasonably to be expected, the unusual and extraordinary.

The action of the plaintiff in suddenly starting to run across the street, in front of this car, was extraordinary, not to be expected and unusual.

So soon as the gripman had notice of the intention of this little lad to do as he did, it became the duty of appellee to run its car with reference to such intent; this it did, but unfortunately the notice came too late.

There is no evidence tending to show that appellee was negligent, either in the equipment or operation of its train.

The following authorities support the conclusion to which we have come: Trumbo v. City Car Co., 89 Va. 780; Fleishman v. Neversink Mountain R. R. Co., 174 Pa. 510; Chilton v. Traction Co., 152 Pa. St. 425; Gannon v. N. O. Ry. Co., 20 So. Rep. 223; Citizens Street Ry. Co. v. Cary, 56 Ind. 396.

The judgment of the Circuit Court is affirmed.

MR. JUSTICE GARY.

I hesitate. Calumet Electric Ry. v. Van Pelt, 68 Ill. App. 582.

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Pioneer Fireproof Construction Co. v. Louise Hansen,
Administratrix.

1. EMPLOYER AND EMPLOYEE—*Care Required in the Performance of Dangerous Work.*—If an employer undertakes to do dangerous work he is bound to provide against injury to employes, whose employment requires them to work in exposed situations.

2. PERSONAL INJURIES—*Liability for, Not to be Relieved by Contract.*—One person can not, by contract with another person, relieve himself from liability for an injury to third persons, caused by his acts, although in the performance of such acts he was commanded by such other person.

TRESPASS ON THE CASE.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

VOL. 69.] Pioneer Fireproof Construction Co. v. Hansen.

STATEMENT OF THE CASE.

This was an action for damages under the statute, by Louise Hansen, as administratrix of the estate of her deceased husband, Oscar Hansen, against the George A. Fuller Co. and the Pioneer Fireproof Construction Co. In February, 1892, the George A. Fuller Co. was engaged as general contractor in erecting the fourteen story building at 34 and 36 Washington street, Chicago. The deceased, Oscar Hansen, was an employe of the Fuller Co. The Fireproof Construction Co. was employed by the Fuller Company to fill in the floors and partitions with fireproof material, and to put on the tile roof.

The building faces north. Along the eastern side is an alley in which material for the building was unloaded, and from which, by means of a derrick placed on the roof, it was hauled up. Oscar Hansen was stationed in the alley, and with another employe of the Fuller company controlled the hoisting operation from that point. The material was loaded onto a platform called a "boat," five feet wide by seven feet long; this "boat" was then fastened to the rope of the derrick and hauled up until it was level with the roof; then the "boom" or arm of the derrick, over the end of which the hoisting rope passed, was raised, thus swinging the boat in until over the spot where it was to be landed, when it was lowered and guided to its resting place. This was done by the employes of the Fuller Company. The tile was then unloaded by laborers paid by the Fireproof Company. At this particular time the roof was partly on, and the boat had to be pulled into a space left in the roof for a dormer window, the iron rafters slanting up on each side thereof. Running north and south on the floor and near the slope of the roof was a six-inch steam pipe. When the loaded boat was hauled in through this hole in the roof, it was lowered and rested across this pipe. There was sufficient room where it could have been drawn in clear of this pipe. On the morning of February 15th, a boat load was landed above and rested across the steam pipe. Thereupon the workmen began unloading the tile from the side nearest

Pioneer Fireproof Construction Co. v. Hansen.

them, the inner side, and after a certain quantity of tile had been removed from the inner side, the boat tilted across the steam pipe and one or more of the tile slid off, striking the steep roof and thence down into the alley. A piece of tile struck Hansen on the head. At the close of the evidence the court instructed the jury to find the defendant, George A. Fuller Co., not guilty. The case proceeded against the Pioneer Fireproof Construction Co., and the jury returned a verdict finding it guilty, and assessing the damages at \$5,000. Motion for a new trial was overruled and judgment was given on the verdict, from which judgment this appeal is taken.

BURNHAM & BALDWIN, attorneys for appellant, contended that if the plaintiff had knowledge of the danger and continued to work there, exposing himself to the danger, it was strong evidence of contributory negligence, citing Beach on Contributory Negligence, pp. 39, 40, 161; Shear & Redfield Neg. (4th Ed.), Vol. 1, pp. 152, 360, 361; Vol. 2, p. 95; American and English Ency. of Law, Vol. 4, p. 36; Village of Clayton v. Brooks, 150 Ill. 97; L. S. & M. S. Ry. v. Pinchin, 112 Ind. 592; Goldstein v. C. M. & St. P. Ry. Co., 46 Wis. 404; Walker v. Lumber Co., 86 Me. 192; Carr v. Sheehan, 81 Hun, 291; Forks Township v. King, 84 Pa. St. 230; Rowell v. Street Railroad Co., 64 Conn. 376; Reed v. Northfield, 13 Pick. 94; Dewire v. Bailey, 131 Mass. 169; Frost v. Waltham, 12 Allen, 85; Marble v. Ross, 124 Mass. 44; Estelle v. Village of Lake Crystal, 27 Minn. 243; Hector Mining Co. v. Robertson, 45 Pac. Rep. 406 (Colo.).

If the general contractor retains the right to exercise control over the manner in which the work is to be done by the sub-contractor, then the doctrine of *respondeat superior* applies and the sub-contractor is a servant and not an independent contractor, and consequently is not liable for the negligence of a laborer. Sherman & Red. on Neg. 278, par. 165; 270, par. 161; Murphy v. Caralli, 3 Hurlstone & Coltman, 461; Murray v. Currie, Law. Rep. 6 Com. Pl. 24; Manning v. Adams, 32 Weekly Rep. (Eng.) 430; Blake v.

VOL. 69.] Pioneer Fireproof Construction Co. v. Hansen.

Thirst, 2 Hurlst. & C. 20; Linnehan v. Rollins, 137 Mass. 123; Clapp v. Kemp, 122 Mass. 481; Cincinnati v. Stone, 5 Ohio St. 38; Wilson v. White, 71 Geo. 506; C., St. P. & F. R. Co. v. McCarthy, 20 Ill. 385; Schwartz v. Gilmore, 45 Ill. 455; Chicago v. Joney, 60 Ill. 383; Andrews v. Boedecker, 17 Ill. App. 213.

SULLIVAN & McARDLE and P. L. McARDLE, attorneys for appellee, contended that the situation in, and circumstances under, which an act is done, determines the duty of care imposed upon the actor, and whether that duty has been discharged, also depends upon the situation and circumstances. C. & A. R. Co. v. Adler, 129 Ill. 335, 340; C., M. & St. P. R. Co. v. Wilson, 133 Ill. 55, 60.

That a negligent manner of executing work is the usual way it is done, does not relieve it of its negligent character or defeat liability. C. & A. R. Co. v. Murphy, 17 Ill. App. 444; Deering on Neg. Sec. 9.

Deceased had a right to assume appellant would not, by its negligence, render his position more dangerous and hazardous than it naturally was. I. C. R. R. Co. v. Noble, 142 Ill. 578, 586; Kellogg v. Chi., etc., Rd. Co., 26 Wis. 255; Fox v. Sackett, 10 Allen R. 536; Newson v. N. Y. Rd. Co., 29 N. Y. 390; Brown v. Lynn, 31 Penn. 510.

One engaging to do specific work according to plans furnished, employing his own agencies and assistants, and under no control as to detail of the work, is clearly a contractor and not a servant, even if power to make changes, etc., right of superintendence or annulment for misconduct, is reserved. Hale v. Johnson, 80 Ill. 185; Erie v. Caulkins, 85 Pa. St. 247; Edmundson v. Pittsburg, 111 Pa. St. 319; Gourdier v. Cormack, 2 E. D. Smith, N. Y. 256; Clare v. Nat'l C. Bank, 40 N. Y. Super. 104; Burmeister v. N. Y. El. R. Co., 47 Id. 264.

It is only when the sub-contractor abandons all control of his servants that he is relieved of liability for their negligence; for control, implying power to discharge, is the conclusive test of whether the relation of master and servant

Pioneer Fireproof Construction Co. v. Hansen.

exists. Whitaker's Smith on Neg. 165; 2 Thompson Neg. 892-3; Sherman & Redfield on Neg., see 161.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant urges that it offered evidence tending to show that owing to the location "it would have been impossible to unload the boat in any other manner than that which was adopted," and that the court improperly refused to admit such evidence.

The fact that one did a lawful thing in the only way possible, does not excuse him from the consequence of his act. Because one is obliged to use explosives to remove an object, he is not absolved from responsibility for the result of such use to the house of a stranger.

Any adult person working at raising these tiles must have known that such work was dangerous; knowledge that prior to the accident to the deceased, tiles had fallen, would have added little, if anything, to a sense of the obvious danger.

The deceased was bound to exercise ordinary care for his safety; that is, such care as was consistent with the work he had to do under his employment.

If appellant had provided a place of safety, viz., a shed, for the protection of those working in the alley, and if the deceased at the time he was struck by the falling tile, might properly and consistently with the work he had to do, have been in this shed, and knew this, so that his exposure to danger from falling tiles was his voluntary act, and not necessitated by his employment, appellant would not have been liable for an accident to him, if he, despite its care, of his own volition, unnecessarily exposed himself to danger. Appellant did not offer to show this; although it did offer to show that it had erected a shed in the alley.

Appellant had contracted to fireproof this building; it employed another corporation to raise the roof tile to the fourteenth story; when such tiles had been so elevated its own servants unloaded them from the boat in which they came up. Whether the Fuller Company had so surrounded

the place of unloading that appellant could not unload without proceeding as it did, and thereby causing tiles to fall to the alley below, is immaterial. If it undertook to do a dangerous act, it was bound to provide against injury thereby to the deceased, whose employment required that he should work where he did.

For a mere passer-by to have walked into the alley and there remained, knowing that from the hoisting going on tiles had fallen, would probably not have been for him an exercise of ordinary care; for the deceased, duty to his employer required him to remain in a place of danger.

The fact, if such there be, that the Fuller Company retained a certain control over the manner in which appellant performed its work, did not absolve it from responsibility for acts resulting in injury to the deceased. A can not, by contract with B, relieve himself from liability for injury to C, caused by acts done by him, A, although commanded by B.

The judgment of the Circuit Court is affirmed.

James H. Gilbert v. Thomas W. B. Murray.

1. **DEMAND—*For Possession in Replevin.***—A levy by an officer under an execution upon property in the possession of the defendant in execution is rightful. To make the possession of the officer wrongful a demand upon him is necessary.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Mr. Justice WATERMAN dissenting. Opinion filed April 15, 1897.

EDWIN C. CRAWFORD, attorney for appellant, contended that a mortgagor in possession has such an interest in the mortgaged chattels as may be seized on execution. Halladay v. Bartholomae, 11 Ill. App. 206.

Where the sheriff has taken possession under an execu-

Gilbert v. Murray.

tion, the mortgagee must make a demand upon the sheriff for surrender of the property before he is entitled to bring a suit. Keller v. Robinson, 153 Ill. 466.

BULKLEY, GRAY & MORE, attorneys for appellee, contended that a default in the payment of any portion of the debt secured at the times specified in the mortgage for the payment of the same, gave appellee, as mortgagee, the right to take possession of the mortgaged property. It was not incumbent upon him to wait until the maturity of the whole indebtedness. McConnell v. Scott, 67 Ill. 274; Cleaves v. Herbert, 61 Ill. 126; Schultz v. Plankington Bank, 40 Ill. App. 462; Marseilles Mfg. Co. v. Rockford Plow Co., 26 Ill. App. 198.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This case is argued upon the assumption by the parties that the appellee had a chattel mortgage upon some tents, and that the appellant, as sheriff of Cook county, under an execution issued upon a judgment against the mortgagor, levied upon the tents, which the appellee thereupon replevied by this action. Two special replications to the plea of the appellant, justifying under the execution, were not answered by rejoinders; but we will consider the case as the briefs assume it to be.

The mortgage provides that the mortgagor may retain possession of the tents "to keep and use the same until it, or its successors or assigns, shall make default in the payment of said sum or sums of money above specified, at the time or times, and in the manner hereinbefore stated, and the said mortgagor hereby covenants and agrees that in case default shall be made in the payment of the sum aforesaid, or any part thereof, on the day or days, respectively, on which the same shall become due and payable, then all of said sums of money remaining unpaid shall, at the option of the said mortgagees, their executors, administrators or assigns, with three days' notice in writing of said option to mortgagees, become at once due and payable, and the said

mortgagees, their executors, administrators or assigns, or or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and may enter any of the premises of the mortgagor, with or without force or process of law, wherever the said goods or chattels may be, or be supposed to be, and search for the same, and if found, to take possession of, and remove and sell and dispose of said property, or any part thereof, in any manner whatever, as the said mortgagees may choose to do with their own property."

The appellant insists that the three days' notice is a condition precedent not only to the whole debt becoming "at once due and payable," but also to the right of the mortgagee to take possession of the property at all before the whole debt was due by the original terms.

A large part of the debt had become due and remained unpaid before this action was commenced.

A chattel mortgage is a sale (defeasible) of the property to the mortgagee, attended by the right of possession by the mortgagee, except so far as that right is limited by the terms of the mortgage. Here the limitation is that the mortgagor might retain possession until default in payment. The event had happened before this suit was commenced, and so the right of possession by the mortgagor had come to an end.

If, therefore, there was no objection to the mortgage other than is brought to our notice, the appellee was entitled to the possession of the property. Nevertheless, the case was wrongly decided below. The mortgagor being yet in fact in possession, a levy upon the property was rightful. To make the possession of the sheriff wrongful a demand upon him was necessary. We do not decide that a demand upon him in person was necessary; that question is not before us, for there is no proof of any demand upon him, or anybody having any connection with him. In fact, there is no proof that he ever had anything to do with the property, and the judgment against him for costs is wrong. Upon the pleas

Gilbert v. Murray.

denying the taking, and the detention, the verdict should have been in his favor. *Keller v. Robinson*, 153 Ill. 458.

The judgment is reversed and the cause remanded.

MR. JUSTICE WATERMAN dissenting.

In this action appellant pleaded *non detinet* and *non cepit* and that he took the property under a judgment and execution against the Sylvan Encampment Co.

Appellee testified that at the time when he commenced this suit the property by him replevied was in "the hands of James H. Gilbert, sheriff," and left the stand. Being recalled, he testified that he demanded possession of the property and "they refused to give them up." Upon cross-examination he said he talked with a man there "who appeared to be in charge—constable, I suppose."

"Q. You mean the sheriff? A. Sheriff.

Q. Do you know he was the sheriff? A. Well, I don't really know whether I did or not."

The demand being upon the person in charge of the property was, I think, sufficient.

Demand should be made upon one who has possession of the goods and is able to deliver them in compliance with such demand. *Wells on Replevin*, Sec. 375.

When a defendant contests the case all through the trial upon a claim of superior right to the property, he can not afterward set up a want of demand as a reason for his failure to surrender. When he desires to reply on a want of demand, he should show a willingness to deliver the goods upon a proper one, and that none has been made. *Wells on Replevin*, Sec. 374.

Proof of any circumstance which would satisfy a jury that a demand would have been unavailing (as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver), will be sufficient to excuse proof of a demand. *Wells on Replevin*, Sec. 373; *Johnson v. Howe et al.*, 2 Gil. 342; *Cranz v. Krozer*, 22 Ill. 74; *Bruner v. Dyball*, 42 Ill. 35.

The pleas of *non cepit* and *non detinet* conceded the right

of property to be in the plaintiff, appellee, and only put in issue its caption and detention. *Von Namee v. Bradley*, 69 Ill. 299.

Under the plea of judgment and levy upon execution, the burden of proof was upon the defendant. *Wells on Replevin*, Sec. 302.

I think the judgment of the Superior Court should be affirmed.

James E. Stuart v. Le Roy Harris.

1. INSTRUCTIONS—*To Find for the Defendant, When Proper*.—When there is no evidence to support the issues made by the pleading, it is proper to instruct the jury to find for the defendant.

2. OFFICERS—*Taking Property from Prisoners*.—An officer may take from a prisoner any articles of property which it is presumable may furnish evidence against him, but money should not be taken unless it is in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his defense.

3. SAME—*Duty in Making Arrests*.—The arresting officer, if he finds on the prisoner's body, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime as its fruits, or as supplying proofs relating to the transaction, may take and hold them to be disposed of as the court directs.

4. CRIME—*Money Found on a Prisoner as the Fruits of*.—It is a question of fact to be left to the jury, whether money found on a prisoner and taken from him by the law officers is the fruits of the crime for which he is convicted.

5. SAME—*Fruit of a Crime*.—By "fruit of a crime" is not necessarily meant the very property stolen.

6. FRUITS OF A CRIME—*Evidence to Determine*.—In determining the fact as to whether money found on the person is the fruit of a crime, evidence of the prisoner's pecuniary circumstances prior to the commission of the crime, the money he had in bank as well as deposits made by him after the commission of the crime, is competent and may be introduced.

7. EVIDENCE—*Pleas Not to be Used as*.—The general rule is that the plaintiff can not use one plea as evidence of the fact which the defendant disputes in another plea.

Trover.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 29, 1897. — Rehearing denied. Opinion on rehearing filed April 15, 1897.

Stuart v. Harris.

GEORGE BOYD and JOHN C. BLACK, attorneys for appellant.

JESSE A. & HENRY R. BALDWIN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

By a motion for a new trial, and by instructions given for the appellee, the question is presented whether there is in the case any competent evidence of the cause of action upon which the appellee recovered; for, if there be no such evidence, the motion for a new trial should have been granted, and the instructions given upon the assumption that there was such evidence should not have been given.

The suit was by the appellee in trover against the appellant for money taken—as was said—by the appellant from the appellee.

The testimony to prove the taking of the money was by the attorney of the appellee, and is as follows:

“On the 24th day of February, 1894, the defendant took from the person of the plaintiff the four \$100 bills, the thirteen \$50 bills, and the thirteen \$20 bills described in the declaration; the \$100 bills were then and are now worth \$100 each; the \$50 bills were then and are now worth \$50 each; the \$20 bills were then and are now worth \$20 each. The taking by the defendant was against the will of the plaintiff; the property was his and was in his possession, and no part of it has been returned to him by Captain Stuart, the defendant, or any one for him.”

The first question and answer on cross-examination utterly destroyed the whole of that narrative as evidence. It might as well have been left unsaid. That question and answer were: “Mr. Baldwin, were you present when these bills were taken from the person of this man Harris? No, sir.” The plaintiff—appellee—had rested his case, and had the appellant then asked the court to instruct the jury to find for the defendant, the instruction should have been granted; *McGeoch v. Hooker*, 11 Ill. App. 649; for the testimony in chief is subject to all the criticism which this court in Earle

v. Earles, 60 Ill. App. 360, and the Supreme Court in Fryrear v. Lawrence, 5 Gilm. 325, made upon the verifications there referred to.

Then, did the cross-examination supply the total want of evidence in chief? All that we find which can be treated as tending that way is this: "Will you state when you were told by Captain Stuart that he took them from his person? Yes, sir. And where? In the United States court room in Chicago, in the old Government building, at various times; once, on the 15th day of March, 1894. I had a stenographer report it, and now have that report in my hands."

The attorney declined to permit the attorney of the appellant to look at that report.

The descriptions of the bills in the declaration, and in the quoted testimony in chief, are alike.

Now, leaving out of consideration the gross improbability that the appellant followed that description in any conversation with the attorney, it is quite certain that he did not say that the bills were those described in the declaration.

The original declaration was filed March 23d, eight days, and the amended May 17th, two months and two days, after the time of the conversation.

It is not proved—there is no evidence tending to prove—that the appellant took from the appellee the bills described, conversion of which is the gist of this action.

The appellant insists upon the want of proof, and it is impossible to sanction the attempt to present as personal knowledge what was at best only hearsay, however authentic the source whence it came.

The judgment is reversed and the cause remanded.

MR. JUSTICE WATERMAN.

Upon the trial of this case below, it appeared that the plaintiff, by means of post office orders by him forged, had obtained from the United States a large sum of money; that he has been convicted of such crime, and at the time of

Stuart v. Harris.

the trial below was in the penitentiary. When arrested he was charged by the post office inspector, the defendant, with his crime and having by means of it obtained \$3,100, and was asked to make restitution for the money he had by such means obtained; to which he replied that he had no money and could not make restitution. It substantially appears that he then had concealed upon his person the money thereafter taken from him by the United States marshal and the defendant, to recover which this action was brought.

The jury had a right to take into consideration his declaration that he had no money, in determining whether the money then on his person, and afterward taken from him, was his.

When searched by the United States marshal and the defendant there was found in the waistband of his pantaloons, stitched tightly between the two buttons to which his suspenders were attached, between four and five hundred dollars in money, and there was found on his right foot, underneath, between the stocking and his bare foot, money attached to the sole of the foot, and in his sock there were two or three small rubber bands, which were broken. The money was taken from his foot with some difficulty without tearing it, as it was sticking to the foot. The bills that were on his foot were stuck together, the upper bill was worn through on the ball of his foot, where the ball of the foot would rest, and also on the heel. The bill next to his foot was worn through. There was also an offensive odor on the bills from the smell of his feet. The plaintiff stated that the money had been where it was found for some time.

In Bishop on Criminal Procedure, Vol. 1, Sec. 210, the rule as to the conduct of an officer in making an arrest is laid down as follows:

“The officer * * * may take from the prisoner any articles of property which it is presumable may furnish evidence against him; but money, for example, should not be taken unless it be in some way connected with the charge

or proof against him, as he is thereby deprived of the means of making his defense."

Section 211: "The arresting officer should consider the nature of the accusation; then if he finds on the prisoner's person, or otherwise in his possession, goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instrument with which it was committed, or as supplying evidence relating to the transaction, he may take them and hold them, to be disposed of as the court shall direct."

Manifestly, the prisoner being charged with the forgery of post office orders, and with having obtained by means thereof a large sum of money, it was the duty of the United States marshal and his assistants to take from the prisoner such money as they reasonably believed to be connected with the crime of which the prisoner was supposed to be guilty.

Whether the prisoner, the plaintiff, was, at the time of the commencement of this action, entitled to have the money so taken from him restored to him, is another question.

The contention of the plaintiff substantially is, that if one, by robbery or other crime, obtain a sum of money and deposit it in bank, he may immediately thereafter withdraw in other money the sum deposited, and that thereby the other money which thus comes into his possession becomes his, so that as against the person from whom he obtained the money he deposited, he may, in an action of trover, recover the money which he drew from the bank.

I do not think that the law goes to the extent claimed by the plaintiff. It is clear that in a court of equity a person having obtained property by criminal means will be held to hold the fruits of such offense as a trustee for the use and benefit of him from whom the property feloniously taken was obtained.

Golightly v. Reynolds, 1 Lofft's Reports, 89, was an action of trover brought for six silver table-spoons, 2 silver salts, 2 silver salt-spoons, one bank note of 20*l.*, number 203, dated November 19, 1771, and 10 guineas in gold, all of which were the produce of a bank note of 50*l.* stolen by ~~~~~~ Ferguson; the property for which trover was brought

Stuart v. Harris.

was found on Ferguson when taken up, and produced in evidence at the Old Bailey by the plaintiff, the prosecutor, at the trial of said Ferguson, who was convicted of the theft of the said bank note of 50*l.* Lord Mansfield in deciding the case, said: “I don’t see why trover is not good. The statute puts an indictment in the same case as a writ of appeal. The statute says it shall be restored, but leaves the party to his own way of recovery; since this statute, it gives him a particular remedy, but does not take away his other remedy.” And there was judgment for the plaintiff.

In 1 Chitty’s Criminal Law, 820, the rule as to stolen property is thus declared: “If the thing stolen has been converted into money, the owner may have the produce instead of the special chattel, for the case, though not within the words, is clearly within the equity of the statute.” Reference is here had to the statute of 21 Henry VIII., providing for restitution of stolen goods. In the Queen v. The Corporation of the City of London, 96 Eng. Common Law, 509, it appeared that certain parties had been convicted of carrying away 500 pounds in weight of gold, and that certain Turkish bonds of the nominal value of 2,300*l.* were found in the possession of the convicted parties when apprehended, and that it was proved to the satisfaction of the court that one-sixth part of such bonds were bought with the proceeds of said felony. It was therefore ordered that such sixth part of the bonds should be given to the parties from whom the gold was stolen.

In Rex v. Rooney et al., 7 Carrington & Payne, 515–32, E. C. L. 735, where a person, a week after the commission of the offense, was apprehended on the charge of robbing A of 25*l.* in notes and 9*l.* in gold, and on the prisoner was found the sum of 12*l.* in gold, but none of it identified, the judge ordered 5*l.* to be restored to the prisoner in order to enable him to make his defense, saying that as a week had elapsed between the time of the robbery and the time of the apprehension of the prisoner, Rooney, the court might presume that a portion of the money in his possession was obtained from other sources.

So in Harris case, Noy, 128, the prisoner stole cattle and sold them in open market at Coventry; being apprehended by the sheriffs, they seized the money, and to the owner of the cattle was given restitution of the money. Croke, Judge, said this was usual at Newgate.

So, too, in Hanbury case, cited in Holiday v. Hix, Croke, Elizabeth, 661, where a servant took gold from his master and changed it into silver, it was held that the master should have restitution of the silver.

In Rex v. Powell, 7 Carrington & Payne, 640, 32 E. C. L. 638, the prisoner was convicted of selling a bill of exchange for 100*l.* and a considerable sum of money in specie, the property of Louis Davis; the prisoner had left a horse with a person at Redburn, in Hertfordshire, intending that it should be exchanged for another. There was no doubt that the horse was purchased with the prosecutor's money, as the prisoner had no money of his own; the horse was therefore ordered to be delivered to the prosecutor from whom the 100*l.* had been stolen.

In the present case it is, in my opinion, a question of fact to be left to the jury to determine whether the money found upon the person and taken from him was the fruit of the crime for which he was arrested and has been convicted; and in determining this fact, evidence of the prisoner's pecuniary circumstances prior to the commission of the crime, the money he had in bank, as well as deposits made by him after the commission of the crime, or other property obtained by him subsequent to the crime, may be introduced, that thereby may be ascertained whether the property now claimed by him is the fruit of the money he feloniously obtained from the United States government or otherwise, and if the money so taken from the prisoner is found to be the fruit of that which he criminally obtained from the United States, then he can not recover in this action. By fruit of crime is not necessarily meant the very property stolen.

MR. PRESIDING JUSTICE SHEPARD.

I concur with Mr. Justice Gary, that the case was not

Stuart v. Harris.

properly proved, but there being no particular controversy but that the money in question was taken by the appellant from the appellee, I think the case ought to be considered upon its substantial merits.

And so looking at the record, I think the judgment ought to be affirmed, upon the ground that there is a total want of proof of the identity of the money that was taken from appellee's person with that stolen by him from the government, or that it was the direct fruits of the crime he committed.

While, therefore, I do not concur in a reversal of the judgment, I agree that the rule to be pursued on another trial is correctly stated by Mr. Justice Waterman in the concluding paragraph of his opinion.

MR. JUSTICE GARY.

So do I, if it shall be sufficiently proved, that Stewart acted under authority of, or with subsequent ratification by, the government.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

The petition opens with the statement that this "case was decided, and the opinion of the court is upon grounds neither argued nor raised by counsel on either side," and cites Seaton v. Ruff, 29 Ill. App. 235, C. C. Ry. Co. v. Van Vleck, 40 Ill. App. 267; and E. St. L. S. Ry. Co. v. Stout, 47 Ill. App. 546, as authority that such practice is wrong.

It is true that there was no argument that can fairly be treated as such, of the quality of the evidence, and yet there was such mention of the objectionable character of that evidence as would put us in the wrong to overlook it. Union Nat. Bk. v. Post, 55 Ill. App. 369.

Opinion on petition for rehearing.

The brief of the appellant says:

"We suppose that this court, if it shall hold to technicalities in this case, will hold to all the technicalities. If the law is invoked by a thief to assist him in consummating his robbery because of technicalities *strictissimi juris*, as much

strictness may be employed in behalf of his victim. We do not invoke this rule. It has been invoked against the appellant. What is the result of its application?

There was a declaration filed, describing certain property alleged to have been lost. An amended declaration was subsequently filed describing certain other properties. The property described in the original declaration amounted to \$1,310. That described in the amended declaration amounted to \$3,930. All the pleas and subsequent proceedings were to and under the amended declaration, but when it came to the proof of the cause of action, the only proof made by the plaintiff, was by the lips of his lawyer testifying to an alleged statement of the defendant, and in which he described the property mentioned in the declaration, and not one word as to the property mentioned in the amended declaration, there was no evidence to sustain the amended declaration, and yet the verdict of the jury and the judgment of the court were in regard to the amended declaration. There should have been no judgment entered upon the testimony.

This may seem more nice than wise, but it is of the very essence of the plaintiff's case. The question of identity of property has been and is his sword and shield."

This is a very lame presentation of the objection—if it was so intended—but for us to disregard it, would be good ground of complaint on an afterthought by the appellant.

The petition says that the appellee had not "rested his case" as is stated in the original opinion.

The abstract says that at the close of his testimony in chief the attorney added "that is my case." Then follows: "The court: Is that all? Mr. Baldwin: Yes, sir."

The petition says of the testimony: "It appears, though his testimony was given as of his own knowledge, he frankly stated that his knowledge was derived from the direct admissions of the defendant made *to him*."

What does appear is, that next preceding the testimony in chief copied in the original opinion, is this:

"Jesse A. Baldwin, a witness on behalf of plaintiff, was sworn and testified in substance as follows:

Stuart v. Harris.

My name is Jesse A. Baldwin; am a practicing attorney, and have been practicing in Chicago for about twenty years. I know the plaintiff and defendant in this suit. On the 24th day of February, 1894, the defendant took from the person of the plaintiff and against his will—

Mr. John C. Black: I object to it. Were you present?

The Court: You will state only those things, Mr. Baldwin, that you personally know.

Mr. Baldwin: I will state more than that. I will give statements made by defendant, and I think your honor will say, if I have it direct from the defendant himself, it is admissible.

The Court: You may state anything that the defendant told you. Go on with your statement.

Mr. John C. Black: May I ask a question? I ask if he was present.

The Court: It is not your turn to ask him. I have notified him not to say anything that he does not know personally or that the defendant did not tell him. Go on, Mr. Baldwin."

The witness did not follow with any statement that the appellant had told the witness anything, but with a positive statement of the happening of events, of which he never had any knowledge.

It is urged that a special plea, put in by the appellant, justifying the taking of the moneys mentioned in the declaration, was a binding admission of the taking, citing Pankey v. Raum, 51 Ill. 88, 91; Atkinson v. Linden Steel Co. 138 Ill. 187, 192; Soaps v. Eichberg, 42 Ill. App. 375, 386; Beach v. Jeffrey, 1 Ill. App. 283, 285; The People v. Gray, 72 Ill. 343, 346; Monroe v. Chaldeck, 78 Ill. 429, 431.

Of these cases only Beach v. Jeffrey and Monroe v. Chaldeck are cases of pleas, and they are pleas of tender, which stand upon a different footing from all other pleas; not because of the admissions in the pleas, but because by bringing the money into court, as he must (Graham's Practice, 541), the defendant estops himself and confers upon the plaintiff the right to take it out. Cox v. Robinson, 2 Strange, 1027; LeGrew v. Cook, 1 P. & P. 332.

The general rule is that "the plaintiff can not use one plea as evidence of the fact which the defendant disputes in another plea." 1 Ch. Pl. 589, note 1, Ed. 1883; Schwartz v. Sutherland, 51 Ill. App. 175.

The general issue in, denied everything.

In the petition it is said that "Mr. Baldwin's testimony is unequivocal to the effect that the description of the bills was correct, and was given to him by defendant Stuart."

We are referred to no place in abstract or record in support of that statement.

The suggestion implying that outside of the record there is a letter relating to this case is useless.

The petition is denied.

MR. JUSTICE WATERMAN.

In a petition for a rehearing filed by appellant, it is stated that appellee "was not an assistant to the arresting officer in any sense other than would be applicable to any other of the four persons who came through on the train with the prisoner."

We think that all persons who were of the marshal's party bringing the prisoner from Buffalo, may be considered as his assistants. The undisputed testimony is that in the presence of Inspector Leatherman and Deputy United States Marshal Colt, "as assisted by them," appellee "was searched;" that appellant thus found certain money concealed in the prisoner's stocking, etc.; that appellant gave to the United States marshal a receipt for the same.

It is clear that appellant, in searching the prisoner and taking money from him, acted as an assistant to the marshal.

It was the duty of the marshal to search the prisoner, and this he could do by assistants.

In searching a female prisoner the marshal does so through the aid of female assistants, who usually do so out of his presence, but the act is his, and the assistants no more liable to respond for trespass to the person of the prisoner than is United States Marshal Colt in the pres-

Underwood v. Vail.

ent instance. The fact that appellant was, when he aided the marshal in searching the prisoner, a post office inspector, did not change the character of his act or forbid his rendering such assistance. A woman, although a book-keeper or post office inspector, might assist the marshal in searching a female prisoner.

Chas. D. Underwood v. John J. Vail.

1. **DAMAGES—\$500 Not Excessive.**—Plaintiff, a man nearly eighty years of age, in good health and able to walk in a sprightly manner without the aid of a cane, was considerably bruised and suffered severe pain for four or five days, required a physician for sixteen days, was not dressed again for a period of about three months, and continued lame more or less. *Held*, \$500 not excessive.

Trespass *vi et armis*.—Appeal from Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

F. W. COOMBS, attorney for appellant.

OLSON & BANTLE, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

On the 12th day of September, 1894, the appellee filed in the court below his certain declaration in trespass *vi et armis*, against the appellant, charging him with having, on the 28th day of February, 1894, assaulted him and with force, etc., driving a certain horse and vehicle upon and against him, thereby knocking him down, wounding and bruising him, etc., causing great pain, preventing him from attending to business, and subjecting him to expense of one hundred dollars in being healed, etc., by which means appellee sustained damage, etc., to the extent of \$5,000, etc.

To this declaration there was filed a plea of not guilty.

On the issue joined trial was had by a jury, resulting in a verdict for plaintiff in the sum of \$500, upon which, over appellant's motion for a new trial and exceptions, the court entered judgment, from which this appeal is taken.

The assignment of errors calls in question the validity of this judgment, and the proceedings upon which it is founded.

The two principal points argued are that the evidence does not justify the verdict, and that the damages are excessive.

There is no contention but that the appellee was run against and knocked down by a horse, and run over by a wagon, driven by somebody. The difficulty lies wholly in determining whether appellant was the driver, and the evidence upon that question was in irreconcilable conflict.

We can not usurp the functions of the jury and overrule their finding simply because we are left in a condition of uncertainty as to the identification of appellant.

There was enough evidence to warrant the jury in believing from it that appellant was the driver, and we can not interfere.

Upon the question of the amount of damages suffered by the appellee there should not be much hesitation.

The appellee was an aged man, nearly eighty years old at the time of trial, and, before the injury, was in good health and walked in a sprightly manner without the aid of a cane, except occasionally. He was considerably bruised and suffered severe pain for four or five days. A physician's daily attendance upon him was required for sixteen days, and there was evidence that he was not dressed again for a period of about three months. Since his recovery he has been "lame, more or less." His physician's bill was \$36.75, and he paid for medicines \$12.

Perhaps a less sum than was awarded might be ample compensation to him, but probably not much less, and the verdict having met the approval of the trial judge, we do not feel warranted in saying it was for more than it ought to have been.

Gage Hotel Co. v. Union National Bank.

The affidavits that were read upon the motion for a new trial furnished no sufficient reason for giving another trial. Their effect was merely to cumulate inferential evidence that it was not appellant who drove the horse and wagon.

Perceiving no error in law upon the record, the judgment will be affirmed.

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Gage Hotel Company v. Union National Bank.

1. BANKS AND BANKING—*Deposits with Instructions Not to Pay a Particular Check.*—A bank is not bound to pay a check out of funds deposited by the drawer, after the check is drawn with specific directions not to pay them out on such check.

Assumpsit, on a check. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

ASHCRAFT, GORDON & Cox, attorneys for appellant.

After a check passes into the hands of a *bona fide* holder for value, it is not in the power of the drawer to command its payment, or of the drawee to refuse payment, if at the time payment is demanded appellee has on deposit sufficient funds of the drawer to pay the check. Munn et al. v. Burch et al., 25 Ill. 35; Union National Bank v. Oceana County Bank, 80 Ill. 212; The Chicago Marine & Fire Ins. Co. v. Stanford, 28 Ill. 168; Bickford v. First National Bank, 42 Ill. 238; Brown v. Leckie et al., 43 Ill. 497; National Bank of America v. The Indiana Banking Co., 114 Ill. 483.

If at the time a check is presented to the drawee, and payment demanded, the drawer has on deposit with the drawee funds equal to the amount specified in the check, it is the duty of the drawee to pay the check. Munn et al. v. Burch et al., 25 Ill. 35; Bickford v. First National Bank, 42 Ill. 238; Fourth National Bank v. City National Bank, 68 Ill. 398; Bank of Antigo v. Union Trust Company, 149 Ill. 343; Merchants National Bank v. Retzinger et al., 20 Ill. App. 27.

VOL. 69.] Gage Hotel Co. v. Union National Bank.

TENNEY, McCONNELL & COFFEEN, attorneys for appellee.

A bank is not bound to pay a check out of funds which it receives after the check is drawn, and with specific directions not to pay them out on that check. *Munn v. Burch*, 25 Ill. 35; *Union National Bank v. Oceana County Bank*, 80 Ill. 212; *Metropolitan National Bank v. Jones*, 137 Ill. 634; *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The material facts are undisputed. On June 21, 1893, one Henry C. Knill drew a check upon the appellee for three hundred dollars, payable to the order of one Leroy Payne, and delivered such check to Payne, who on the same or the following day indorsed and delivered it to the appellant in exchange for its face amount in currency.

Appellant deposited the check on the same day that it cashed it, to the credit of its bank account with the Union Trust Company, which bank caused the check to be presented to appellee for payment, through the clearing house, on June 23, 1893, but its payment was refused and the words "payment stopped" written on it. The check was, in due course of business, taken up and returned to the appellant on June 24th. After the check came back to the hands of appellant, on June 24th, it was again presented by the appellant, and payment requested of the appellee, but its payment was again refused for the reason, as stated by appellee's paying teller, that its payment had been stopped by the drawer.

Neither at the beginning nor at the close of the bank's business on the date the check was drawn did Knill, the drawer, have sufficient funds on deposit with the drawee to pay it, but at the time it was presented he had more than sufficient on deposit to pay it. He had, however, subsequent to the giving of the check, and while he had only \$98.53 to his credit, notified appellee not to pay the check, and all subsequent deposits made by him, whereby his account was increased, were made and received by the bank subject to such notification.

Gage Hotel Co. v. Union National Bank.

At the time appellant cashed the check for Payne it had no notice that Knill had ordered appellee not to pay it.

Perhaps it is immaterial to the legal rights of the parties, but it may be stated that Knill ordered the appellee not to pay the check because a check given to him by Payne in exchange for it was found to be not good.

The question of law that occurs upon such a state of facts is one of interest, and of much collateral importance.

The general rule stated in *Munn v. Burch*, 25 Ill. 35, and ever since adhered to in this State, is that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for.

In *Union National Bank v. Oceana County Bank*, 80 Ill. 212, it is said:

“The principle of all the cases in this court on this subject is that when a depositor draws his check on his banker, who has funds to an equal or greater sum than his check, it operates to transfer the sum named to the payee, who may sue for and recover the amount from the bank, and that a transfer of the check carries with it the title to the amount named in the check to each successive holder.” See also *Metropolitan Nat. Bk. v. Jones*, 137 Ill. 634, wherein it is held that the rule is based upon the implied agreement on the part of the bank to pay out deposited money to the holders of the depositor’s checks in such sums and at such times as the depositor shall by his checks order it to be done.

It follows that a depositor who has a right to his money on deposit may transfer such right to another by drawing and delivering to him his check therefor, and that the implied agreement by his banker, which arose when the deposit was taken, binds the banker to recognize such transfer and pay the amount of the check to its holder when the check is presented or payment.

But such obligation by the banker must be subject to the contingency that the depositor has sufficient funds in the bank to meet the check when presented. It is not until

VOL. 69.] Gage Hotel Co. v. Union National Bank.

presentment of the check to the banker that the transfer made by the depositor becomes obligatory upon the banker in favor of the checkholder. Until presentment of the check there is no privity of contract between the banker and the checkholder, and so unless at the time of presentation, the banker has on hand unappropriated funds of the depositor sufficient to pay the check the banker is under no duty to the checkholder.

Now, in this case, Knill, the drawer, did not have on deposit, when he gave the check, enough to pay it with. His balance at that time was proved to be only \$98.53. The check, therefore, did not operate as an assignment or transfer of his bank account to the amount of the check, for such amount did not exist to his credit, and not existing there was no agreement, implied or otherwise, by the bank with relation to the check, in favor either of the drawer or the checkholder.

It will not be claimed that any liability could arise on the part of the bank, because of the check, until it had on deposit enough of the drawer's money to meet it. Before that condition arose, Knill had directed the bank not to pay the check. No liability to the checkholder by the bank existing when such direction was given, what was its right with reference to receiving subsequent deposits from Knill?

It was not obliged to accept any further deposit from him, and unless it did, it would never become liable to the checkholder. Neither was Knill compellable by the bank to make any further deposit with it.

The fact that the check in question was known by the bank and Knill to be outstanding, in no manner altered their right to have no further dealings with each other, and they were free to deal further with one another or not, and if they did, to make such terms as they chose with reference to their further dealings.

The checkholder had no recognized right up to that time against the bank.

Under such circumstances and under an agreement with the bank to the effect that no subsequent deposits should be

Kiel v. City of Chicago.

applied to the payment of the check in question, Knill made the deposits which increased his account to a sum in excess of the amount of the check on the day it was presented through the clearing house.

We regard such an agreement entered into at a time when both parties were entirely free to act, and before the bank was under any liability whatever to the checkholder, as being one that banks and their depositors are at liberty to make, and as being such an agreement as the business relations between banks and their depositors should require be upheld and protected.

No other questions being argued, we see no occasion to pursue the subject further.

The judgment of the Circuit Court will be affirmed.

Henry Kiel v. City of Chicago.

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1. CITIES AND VILLAGES—*Power to License Brewers and Distillers.*—Clauses 46, 66 and 91 of Sec. 62 of Chap. 24, R. S., give a city power to enact an ordinance imposing a license upon persons carrying on the business of a brewer or distiller, and to provide that the selling or delivering within the city of any product of a brewery or distillery, by or on behalf of the person, firm or corporation conducting or operating such brewery or distillery, shall be held to be carrying on the business of a brewer or distiller.

2. CONSTRUCTION—*Of Penal Statutes.*—While penal statutes are to be strictly construed and not extended by implication to persons or things not expressly within their terms, they must be construed reasonably and matters clearly included may not be omitted by construction.

3. LICENSES—*Exemption as to Articles.*—An ordinance imposing a license on persons carrying on the business of a brewer or distiller is not rendered void because it exempts weiss beer. Such an exemption is as to an article, not a person.

4. SAME—*Statements as to Applicant's Business in Applications for.*—Provisions requiring a disclosure by the applicant for a license of his place or places of business outside of the city to which application is made, and of the name of each and every agent representing the applicant in such city, are not unreasonable regulations as aids to a proper enforcement of the ordinance.

Transcript, from a justice of the peace. Appeal from the Criminal Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

The case at bar is the outgrowth of three actions in debt originally instituted in a justice court by the city of Chicago, against the defendant, Henry Kiel, and others, to recover a penalty for the alleged violation of an ordinance passed by the common council of the city of Chicago, on the 30th day of March, A. D. 1896, which resulted in judgment in favor of the city. An appeal was taken in each of the said cases to the Criminal Court of Cook County, where, by agreement of counsel, the three cases were consolidated and submitted to the court for trial, without the intervention of a jury, upon a stipulation of facts.

The court found the defendants guilty and assessed a fine of \$100 against each and entered a judgment on the finding, but suspended the judgment in two cases, pending a decision herein by this court; from the said judgment the defendant, Henry Kiel, prosecutes this appeal.

The defendant was employed by the Herman Berghoff Brewing Company of Ft. Wayne, Indiana, to, and did sell and deliver their beer in the city of Chicago; none of the beer so sold and delivered was made or brewed within the corporate limits of the city of Chicago; this the defendant did without a license under the ordinance in question.

Section one and a portion of section two of the ordinance under consideration are as follows:

“Section 1. No person, firm or corporation shall carry on the business of a brewer or distiller within the city of Chicago, without having first obtained a license for such business as hereinafter provided, for each brewery and each distillery conducted by such person, firm or corporation. The selling or delivering within said city of any product of a brewery or distillery, by or on behalf of the person, firm or corporation conducting or operating such brewery or distillery, shall be held to be carrying on the business of a

Kiel v. City of Chicago.

brewer or of a distiller, as the case may be, within the meaning of this ordinance, and to be covered by this ordinance; provided that the provisions of this ordinance shall not apply to the manufacture or sale of weiss beer.

“Section 2. Any person, firm or corporation desiring to carry on the business of brewer or distiller in said city, shall file with the city clerk or city collector an application containing the full name of the applicant, the business proposed to be carried on, and whether such business will include brewing or distilling within said city, or only disposing, within said city, of liquors brewed or distilled by the applicant elsewhere, the location of the place or places of business of the applicant, including the location of the brewery or distillery whose product is to be disposed of in said city under the license, and the name of each and every agent within said city representing any such applicant whose business may be carried on in said city through an agency. A separate application shall be made in respect to each brewery or distillery wherever located.”

FITCH & DUHA, attorneys for appellant.

It is the well settled law in this State that “municipal corporations exercise only delegated and limited powers, and in the absence of express statutory provisions to that effect courts are authorized to indulge in no presumptions in favor of the validity of their ordinances. If in conformity with the express or necessarily implied grant in the charter, they are valid—otherwise not.” Schott v. People, 89 Ill. 197.

It is also the law in this State that “penal statutes are to be strictly construed and not extended by implication to persons or things not expressly within their terms.” Chicago v. Rumpf, 45 Ill. 90; Wright v. People, 61 Ill. 382; Waddle v. Duncan, 63 Ill. 223; Siegel v. People, 106 Ill. 98.

An ordinance is void if it unjustly discriminates between persons coming within the same class or if it imposes burdens on some, from which others are, by its terms, exempt. City

VOL. 69.]

Kiel v. City of Chicago.

of Cairo v. Feuchter, 159 Ill. 155; Timm v. Harrison, 109 Ill. 593; City v. Tate, 130 Ill. 247; Tugman v. City, 78 Ill. 405; East St. Louis v. Wehrung, 50 Ill. 28; Concordia Cemetery v. M. Ry. Co., 121 Ill. 199; Zanone v. Mound City, 103 Ill. 556.

WILLIAM G. BEALE, corporation counsel, TIFFANY BLAKE, assistant corporation counsel, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Clauses 46, 66 and 91 of article 5 of chapter 24 of the Revised Statutes, give to the city power to enact the ordinance. McPherson v. Village of Chebanse, 114 Ill. 46; Dennehy v. City of Chicago, 120 Ill. 627; Schumm v. Gardner, 25 Ill. App. 633.

Penal statutes are, indeed, to be strictly construed, and not extended by implication to persons or things not expressly within their terms, but they are to be reasonably construed.

The ordinance clearly includes both selling and delivering beer within the city.

Selling beer is certainly a part of the ordinary business of a brewer. A brewer makes beer to sell, not to give away or consume. A part of his ordinary business is carried on wherever he sells or delivers beer.

The ordinance is not rendered void by its exemption of weiss beer. The exemption is as to an article, not to persons. Timm v. Harrison, 109 Ill. 593.

The provisions requiring a disclosure by the applicant for a license of his place or places of business outside the city of Chicago, and of the name of each and every agent representing the applicant, are not unreasonable regulations as aids to a proper enforcement of the ordinance.

The judgment of the Criminal Court is affirmed.

ANALYTICAL INDEX.

A

ABATEMENT —Pleas in, must be interposed at first opportunity..	623
When non-joinder should be pleaded in.....	412
ABSTRACTS —Must show errors relied on.....	613
Exceptions must be shown by.....	58
Reference to record not sufficient.....	146
What instructions should be contained in.....	892
What they should show.....	158
When they should contain all instructions given.....	189
ACCEPTANCE —Of insurance policy is a question of fact.....	479
ACCIDENTS —Master not liable for injuries to servant caused by an accident.....	87
ACCOUNTING —Where identity of property is lost.....	501
ACTIONS —Forms of, when optional before a justice.....	160
Names of, before justices of the peace.....	159
ADMINISTRATION OF ESTATES —Appeals by special adminis- trators.....	499
ADVICE OF COUNSEL —As a defense in an action for malicious prosecution.....	123
Good faith in securing and acting upon a question of fact....	128
AGENCY —Agent may sue when principal is not disclosed.....	436
ALIMONY —Can not be due to the people.....	517
Can not be allowed to a husband.....	68
AMENDMENTS —Of appeal bonds.....	184
Of motions for new trial.....	591
Of petition for writ of certiorari and accompanying affidavit..	192
ANTICIPATION WARRANTS —Duty and liability of city treas- urer as to.....	167
ANTE-NUPTIAL CONTRACTS —Effect of performance.....	406
Existence of, etc.....	453
APPEALS —Record should contain copy of bond, and show ap- proval thereof.....	184
Bond must be approved and filed within the time required....	184
May be dismissed by the court, of its own motion, in a proper case	184
By special administrators.....	499

APPEALS. *Continued.*

Effect of, on receivership proceedings.....	72
Failure of justice to keep promise to give notice of rendition of judgment does not excuse failure to take.....	193
From justices.....	645
From orders in subsequent proceedings—Effect on original decree.....	122
From the County Court in probate matters.....	467
In bastardy cases.....	244, 325
Informality of the proof on.....	451
Lie from refusal to appoint receiver, after sale in foreclosure suit.....	535
Lie only from final judgments.....	179
From the County Court—How taken.....	176
Questions arising on.....	251
Separate appeals may be joined as one case.....	518

APPELLATE COURT PRACTICE —Absence of a bill of exceptions.....	540
Abstract must show error complained of.....	613
Affirmance on insufficient abstract.....	146, 158
Appellees must file briefs.....	186
As to refused instructions, when abstract is incomplete.....	189
Certified copies of orders.....	47
Citation of authorities.....	54
Errors not argued deemed abandoned.....	420
Exceptions not taken in the court below.....	238
Instructions not shown by the abstract.....	256
Motions to strike affidavits from the files.....	249
Propositions of law.....	251
Only points raised in briefs considered.....	553
Presumption when the declaration is not abstracted.....	106
Reversal of orders or judgments.....	49
Second presentation of the same question in the same case....	472
What the record must show.....	38
When errors will be deemed waived.....	436
Where case was tried on an erroneous theory.....	43
Where no exception was taken to a ruling of the trial court...	56

ARBITRATORS —Revocation of submission.....	578
Stipulations as to fees.....	578

ASSESSMENT OF DAMAGES —Must be made on evidence.....	203
---	-----

ASSIGNMENT —Of building contract—Effect on mechanic's lien— Of lease—Effect of.....	538
Of freight charges by operation of law.....	497, 498

ATTACHMENTS —Jurisdiction.....	620
Presumptions as to jurisdiction.....	620

ATTORNEYS —Duty of, in preparing decrees.....	137
--	-----

AVERMENTS —Not traversable.....	83
--	----

B

BAGGAGE—Responsibility of hotel keeper for.....	618
BANKS AND BANKING—Deposits with instructions not to pay a particular check.....	681
BASTARDY—Appeals lie directly to the Appellate Court.....	244, 325
BILLS OF EXCEPTIONS—Copying papers and records not in evidence.....	203
Effect of absence of.....	540
Effect of amendments.....	553
When necessary.....	644
BOARDS OF TRADE—“Ringing up”.....	19
BONDS—Execution of, by agent— <i>Descriptio personae</i>	349
BREWERS AND DISTILLERS—Power of city to impose license on	685
BRIEFS—Should be filed by appellees.....	186
BRIDGES—When and how township may secure aid in constructing	344
BROKERS—When entitled to commissions on a sale of property..	352
BUILDING ASSOCIATIONS—Paid up stock—Owners of, not entitled to priority.....	485
Mortgage indebtedness not to be reduced by premiums.....	253
Borrowing members, no right to withdraw premiums.....	252
BURDEN OF PROOF—As to cause of injury to passenger.....	363
BY-LAWS—Of typographical union—A by-law construed.....	305

C

CAUSE OF ACTION—Foreign judgment and original claim—Election.....	43
CERTIORARI—Petition for writ of, and accompanying affidavit are amendable.....	192
CHATTEL MORTGAGERS—Distinguished from conditional sales..	207
On household goods, for purchase money.....	62
Sales under act of 1895.....	272
When the act of 1895 does not apply.....	272
CHECKS—On which payment has been stopped.....	681
CITIES AND VILLAGES—Duty of keeping sidewalks in repair..	410
Estoppel to deny validity of directions to city treasurer.....	167
Treasurer's duty and liability as to anticipation warrants.....	167
Ordinances granting special privileges.....	474
Power to license trades, professions, etc.—Taxes.....	638
Licensing stationery engineers.....	638
Power to license brewers and distillers.....	685
COLLECTION AGENTS—Liability for acts of correspondents....	833

COMMON LAW—Application of its principles to changing conditions.....	618
COMMON CARRIERS—Freight charges as between connecting lines.....	497, 498
Acceptance of persons as passengers on defective tickets.....	628
Can not limit liability for negligence.....	363
Presumptions as to cause of injury to passenger.....	363
Limitations of liability by contract.....	438
When persons become passengers.....	609
Must know who are passengers.....	609
CONTRIBUTORY NEGLIGENCE—Forbids a recovery.....	110
The doctrine repudiated.....	104
COMPROMISES—Do not bind infants.....	64
CONCLUSIONS—Statement that defendant is indebted to plaintiff	48
CONDITIONAL SALES—Justice not liable for failure to docket acknowledgment of.....	207
Rights of the parties.....	225
Widow of vendee claiming award not a third party.....	225
CONFLICT OF LAWS—Application of the <i>lex loci contractus</i>	363
As to time of commencement of action.....	594
CONSIDERATION—Failure of, between drawer and drawee as affecting payee of bill of exchange.....	268
Failure of, under the general issue.....	50
Of a guaranty made after delivery of a promissory note.....	114
Of notes—Parol evidence to show failure of—Other instruments as part of the transaction.....	300
Of sealed instruments, fraud in.....	117
What can not be pleaded as a failure of—Set-off.....	45
When illegality of part will taint the whole.....	422
Illegality of, as a defense.....	615
CONSTRUCTION—Of penal ordinances.....	571
Of written Instruments—Release of covenants in a lease.....	85
Of penal statutes.....	586, 685
Of pleadings.....	288
Of will by trial court, sustained.....	501
CONTRACTOR—Employer not liable for negligence of.....	57
CONTEMPT—Improper opening of deposition.....	47
CONTRACTS—A contract construed.....	31
Acquiescence in attempt of third party to alter.....	599
An agreement of renewal of a lease construed.....	182
Description of parties in.....	349
Limitations of liability by common carriers.....	438
Limiting liability of carrier for negligence, void.....	363
To pay for property delivered under an agreement within the statute of frauds, implied.....	357
Relieving from liability for negligence.....	659
Stipulations as to actions thereon.....	416

CONTRACTS. *Continued.*

Taking security for subscription does not release subscriber...	441
Void under the <i>lex loci contractus</i>	363
CONVERSION—Of mortgaged property—Measure of damages for	68
COPY OF ACCOUNT SUED ON—When a part of the record....	33
CORPORATIONS—Appointment of receivers for.....	513
Denial of corporate existence.....	645
Evidence of existence of.....	332
Liability for negligence while in the hands of a receiver.....	576
New promise removing bar of statute of limitations.....	244
When persons taking steps to form, are partners.....	527
COURTS—Appeals in bastardy cases.....	244, 325
Can not commit error, when.....	132
How appeals should be taken.....	176
Power of Appellate Court to dismiss appeals of its own motion	184
Power of the judge after adjournment.....	138
Power to undo past action.....	593
COURTS OF EQUITY—May of their own motion dismiss bills showing existence of remedy at law.....	507
CREDITOR'S BILLS—What assets may be reached by.....	604
CRIME—Money found on a prisoner as the fruits of.....	668
Fruit of a crime.....	668
CRIMINAL LAW—Extortion by threats.....	398
CROSS-EXAMINATION—As to the cause producing a particular result.....	53
Relating to matters not pleasant to reveal.....	53
As to details of treatment by physician.....	53
Objections to matters brought out on, on appeal.....	262
CUSTOM AND USAGE—Can not justify the creation of a nuisance.....	588

D

DAMAGES—Assessment of, must be made on evidence.....	203
Assessment of, on dissolution of injunction.....	238
Caused by negligence—Release of by contract.....	257
<i>Damnum absque injuria</i>	288
Public improvements.....	288
Elements of humiliation and grief.....	549
From acts not necessarily subject to complaint should be specially pleaded.....	288
For trespasses by domestic animals.....	338
Sale of a burglar proof safe.....	106
\$500 not excessive.....	679
DEBT—The appropriate action for statutory penalties	272
DECLARATIONS—When they must be filed.....	199
DECREES—Admission of incompetent evidence not ground for reversal of.....	402

DECREES. *Continued.*

Dismissing bills need no evidence to support them.....	238
Can not be attacked collaterally for mere error.....	122
On conflicting evidence.....	604
When a bar at law.....	119
DEFAULTS —When motions to set aside should be overruled....	428
DELIVERY —In sales of personal property.....	821, 295
DEMAND —For possession in replevin.....	664
DEMURRERS —Practice where judgment on, is reversed.....	203
To bills after answer.....	507
Waiver of.....	800
DEPOSITIONS —Improper opening of, is contempt.....	47
Improper opening of—How shown in court of appeal.....	47
Who is a non-resident.....	422
DESCRIPTIONS —Of land in damage suits.....	412
DISTRAINT —Of animals trespassing—Damages.....	338
DOMESTIC ANIMALS —Running at large—Turkeys not included.	337
Trespasses by.....	337
DRAINAGE COMMISSIONERS —Requisites of order substituting one commissioner for three.....	176
DURESS —Recovery of money paid under.....	562

E

EASEMENTS —When they do not pass by implication.....	582
Partial release of mortgage will not create, as to land not released.....	582
ELECTION —Between judgment and original claim.....	43
ELECTRIC CARS —Duty of gripman.....	656
EQUITY PLEADING —Demurrers after answer.....	507
Matters not admitted, are in issue.....	75
EQUITY PRACTICE —Admission of incompetent testimony.....	402
Attorneys should prepare decrees.....	137
No evidence necessary to support a decree dismissing a bill....	283
ERRORS —Must be disclosed by the abstract.....	613
Without injury.....	613
In denying relief—What are not.....	159
Not argued deemed abandoned.....	420
Of which the appellant can not complain.....	638
When not ground for reversal.....	22
Who may complain of.....	142
ESTOPPEL —Duty of one who mixes his goods with another's....	320
Of city to deny validity of directions to city treasurer.....	167
EVIDENCE —Admission of incompetent evidence in equity suits not ground for reversal.....	402
Brought out on improper cross-examination.....	263
Cross examination as to the cause producing a particular result.....	53

EVIDENCE. *Continued.*

Cross examination as to the details of treatment by a physician.....	53
Existence and sufficiency of.....	648
How fraud may be proven.....	219
Identification of notes.....	818
In suits against the payee of a note to recover money paid to an assignee.....	479
Mortgages admissible to show amount due.....	68
Need not be stated in pleading.	61
Objections to should be specific.....	60
Of corporate existence.....	332
Of ownership of land.....	412
Of the contents of ordinances.....	262
Of the exercise of ordinary care.....	256
Of the sufficiency of cattle-guards.....	274
Of title to land.....	75
Of wrongs not alleged in declaration.....	77
Opinions on matters of common knowledge.....	69
Opinions of experts where the facts can be ascertained.....	69
Pleas not to be used as.....	668
To identify the fruit of a crime.....	668
Statement that defendant is indebted to plaintiff is a conclusion	48
Weight of, a question for the jury.....	187
When statements as to condition of land are not opinions.....	801
EXCEPTIONS —Must be shown by abstract.....	58
Necessary if ruling is to be questioned.....	186
When necessary.....	158
EXECUTIONS —Duty of one who mixes his goods with another's..	320
Levies upon property in possession of execution debtor.....	664
Levy of, on property sold without consideration.....	41
EXEMPTIONS —Desertion of the husband—Subsequent incumbrances.....	461
EXPERTS —Opinions of, on matters of common knowledge.....	69
Opinions of, where the facts can be ascertained.....	69

F

FELLOW-SERVANTS —Street car crews.....	57
The relation found to exist.....	616
FINDINGS BY THE COURT —Upon conflicting evidence.....	83
FORCIBLE DETAINER —Informalities in the proof on appeal....	451
FORMER DECISIONS —In the same case are binding.	88
FRAUD —How proven.....	219
In assigning homesteads.....	219
In the consideration of sealed instruments.....	117
Knowledge of, as affecting right to rescind.....	42
In securing the execution of commercial paper.....	489

FRAUDS AND PERJURIES—Oral ante-nuptial contracts.....	406
FRAUDULENT CONVEYANCES—Consideration—Other objects in view.....	236
Conveyances from father to son.....	236
Deeds from husband to wife.....	405
FRAUDULENT SALES—Knowledge of the purchaser.....	320
FRUITS OF A CRIME—Evidence to determine.....	668

G

GAMBLING—Application of section 182 of the Criminal Code....	566
Letting premises for—Intention of the landlord.....	134
Sales for future delivery.....	422
GARNISHMENT—Answer must show possession of property in garnishee to sustain a judgment.....	621
GENERAL ISSUE—Failure of consideration under.....	43, 50
Recoupment under plea of.....	300
GIFTS—By a husband to his wife.....	230, 307
GUARANTOR—Discharged when the principal debt is extinguished	119
GUARANTY—Amount due but unpaid on, allowed as a set-off....	518
Blank indorsements.....	114
Made after the delivery of the note.....	114
GUARDIAN AND WARD—Practice as to allowance of final report.....	467
Rule as to the use of the ward's money for his support.....	467
Duty of the guardian to invest funds and make reports— Method of accounting in case of failure.....	467
Guardian must protect rights of ward.....	468

H

HIGHWAY COMMISSIONS—Authority of in regard to repairs..	326
HOMESTEADS—Errors in judgment by commissioners to assign..	219
Evidence of undervaluation to show fraud in assigning.....	219
Commissioners to assign should be fairly chosen.....	219
When fraud in appointment of commissioners to assign may be inferred.....	219
HOTEL KEEPERS—Are responsible for baggage received outside of hotel.....	618
HUSBAND AND WIFE—Ante-nuptial contracts.....	405
Liens for money advanced by the wife.....	406
Deeds from husband to wife.....	405
Desertion transfers right to exemption to family.....	461
Competency as witnesses for or against each other.....	818
Gifts of household furniture.....	307
Husband can not be allowed alimony.....	68
Liability of husband for support of wife.....	223

HUSBAND AND WIFE. *Continued.*

May give preferences to each other in paying debts.....	458
Power of the husband to limit the wife's recovery by contract.	257
Transfers of property between.....	230
Gifts by a husband to his wife.....	230

I

IMPROVEMENTS—Of real estate—Liability for, as between tenant for life and remainderman.....	340
INDORSERS—Warrant their title to negotiable paper.....	632
INFANTS—Not bound by compromise of suit.....	64
Suits by next friends.....	64
Authority of a next friend.....	64
INJUNCTIONS—Assessment of damages on dissolution.....	238
Orders for should appear of record.....	188
Void orders for.....	188
To restrain collection of judgments—Application of the statute	430
When error to issue without notice.....	560
INSTRUCTIONS—Accuracy required in close cases.....	189, 389
Care in running trains over highway crossings.....	238
Error without injury.....	613
Failure to ask for.....	408
Charge should be construed as a whole.....	408
Rule as to omissions when oral instructions are given.....	408
Harmless inaccuracies.....	413
Must be based upon the evidence.....	580
Practice in Appellate Court when the abstract is incomplete as to.....	189
References to the declaration.....	256
Not shown by the abstract.....	256
Statement of a general rule not objectionable.....	392
When refusal of, is assigned as error those given should be in abstract.....	392
The rule as to accuracy.....	180
Inaccuracies in—When cured by other instructions and when fatal.....	180
To be considered together and in connection with the evidence	22
To find for the defendant.....	128, 668
To find for the plaintiff.....	113
When errors in, not ground for reversal.....	609
When errors in, will be deemed waived.....	436
When party can not complain of error in.....	588
INSURANCE—Acceptance of policy.....	479
Circumstances tending to show an acceptance of a policy.....	479
Rules of mutual companies should be enforced.....	492
Statements in the application as warranties.....	447
Falsity of statements in the application an affirmative defense.	447
When proofs of death are unnecessary.....	447

INSURANCE. *Continued.*

Waiver of conditions.....	649
When the question of insurable interest should be raised.....	650
INTENTION—How established.....	422
INTEREST—On damages for breach of a written contract.....	591

J

JOINT LIABILITY—For torts.....	36
JUDGES—Power of, out of court in term time.....	138
JUDGMENTS—Against the preponderance of the evidence.....	132
By confession—Vacation of, and appeal.....	131
By confession—When not interfered with.....	538
Effect of a reversal.....	123
Findings of amount due do not amount to.....	199
Injunctions to restrain the collection of—Application of the statute.....	430
Jurisdiction in attachments.....	620
Must be sustained by the record.....	517
Must be sustained by the evidence.....	195
Sustained by the evidence.....	196
Recitals in.....	64
Void judgments may be reversed.....	621
Warranted by the law and evidence.....	145
When appeals from, will lie.....	179
When reversed are no bar to a second action.....	123
JURISDICTION—Allegation of want of.....	314
In attachments.....	620
JURIES—Are the judges of the weight and effect of the evi- dence.....	223
Waiver of, by agreement.....	88
JURORS—Statements of, can not be received to impeach ver- dict	314
JUSTICES—Appeals from—How taken.....	645
Forms of action before.....	159
Right of plaintiff to elect as to form of action before.....	160
Have no power to amend their records.....	193
Promises to notify party of rendition of judgment not binding on opposite party.....	193
Not liable for failure to docket acknowledgment of conditional sale	207

L

LANDLORD AND TENANT—Effect of assignment of lease.....	538
Letting premises for gambling—Intention of the landlord....	134
Permission to tenant to sell crop waives lien.....	419
Recoupment by tenant when sued for rent.....	573
Release from liability to perform covenants of lease.....	85

LEVY—Of execution—When properly made.....	41
LICENCES—Exemption as to articles.....	685
Statements as to applicant's business in applications for.....	685
Power of cities and villages to require, of brewers and distillers.....	685
Power of cities and villages as to.....	688
LIENS—Waiver of, by landlords.....	419
LIMITATIONS—Additional counts stating same cause of action..	527
As a defense on appeal—What the record must show.....	478
New promise by a corporation.....	244
When action is commenced, decided by the laws of this State	594

M

MALICIOUS PROSECUTION—Probable cause.....	123
Signing complaint not essential to liability.....	61
Advice of counsel.....	123
Identity of plaintiff and person prosecuted.....	61
Advice of counsel a question of fact.....	123
MANDAMUS—Requisites of the petition for county aid in building bridges.....	464
MASTER AND SERVANT—Care required in the performance of dangerous work.....	659
Duty of the master in providing machinery.....	189
False representations by servant.....	458
Evidence as to truth of representations by servant.....	458
Master is not liable for injuries caused by accident.....	87
Measure of damages for wrongful discharge.....	591
Risks of the employment.....	297
Servant's duty to observe and complain of danger.....	892
Voluntary choice of dangerous mode of doing work.....	212
Limitations on the duty of the master to keep machinery in repair	212
MEASURE OF DAMAGES—For wrongful discharge of servant..	591
Mental pain in actions for negligence.....	609
When errors in instructions as to, not ground for reversal....	609
Sale of a burglar proof safe.....	106
In suit by mortgagee for wrongful conversion.....	63
MECHANIC'S LIENS—Are purely statutory.....	555
Statement of claim.....	555
Assignment of contract—Decree in favor of sub-contractor...	26
Waiver of.....	26
Extent of.....	443
Purpose of the notice.....	443
When notices are not required.....	443
Repairing, on separate tracts.....	240
MEDICAL PRACTICE—Who are physicians.....	654
Persons holding themselves out as doctors.....	655

MISNOMER—Of a legatee.....	281
MORTGAGES—Measure of damages for wrongful conversion....	63
Admissible to show amount due.....	63
Provision for appointment of receiver should be enforced....	536
Taking additional security.....	35
When easements do not pass by implication.....	582

N

NEGOTIABLE INSTRUMENTS—Blank indorsements of promissory notes.....	114
Guaranty made after delivery of note—Consideration.....	114
Extinguishment of principal debt discharges guarantor.....	119
Failure of consideration between drawer and drawee as affecting payee.....	268
Parol evidence to vary or deny.....	479
Payment of drafts—Forged indorsements.....	632
Payment of drafts to other than the true owners.....	632
Liability of indorser.....	632
NEGLIGENCE—A question of fact for the jury.....	17
Failure of master to provide safe machinery.....	189
Failure of railroad company to properly fence right of way.163, 432	
Failure of railroad to warn people off of public street is not... 557	
Failure to perform duty required by law—Who may sue.....	392
Humiliation and grief as elements of damages for.....	549
In repairing sidewalks a question of fact.....	410
In running trains over highway crossings.....	233
Injuries from accident—Employer not liable.....	87
Joint liability of railroads for negligence of lessee company...	262
Liability of persons inviting another into danger.....	528
Liability of railroad for failure to build fences and cattle-guards	392
Limitations of the duty to furnish safe machinery.....	297
Limitations on liability for, by contract.....	257
Of carrier—Liability for can not be limited by contract.....	368
Of independant contractor.....	57
Of the plaintiff precludes a recovery.....91, 104, 110	
Of receiver—Liability for.....	576
Ordinary care by plaintiff essential in actions for.....	180
Question of, when to be submitted to the jury.....	658
Speed of cars in the absence of ordinances.....	656
Railroads—Construction of track.....	257
Stating duties in actions for, is surplusage.....	609
Measure of damages in actions for.....	609
Showing necessary, in actions based on.....	197
The doctrine of comparative negligence repudiated.....	104
Traveling on a defective street.....	277
Knowledge of defects in a street.....	277
Voluntary choice of dangerous mode of doing work.....	212
Limitations on the duty of a master to keep machinery in repair.....	212
Sudden starting of a street car.....	77

NEW TRIALS—Amendment of motions for.....	591
Grounds for, not stated, are waived.....	623
NEXT FRIEND—Authority of.....	64
Regarded as an officer of the court.....	64
NON-JOINDER—When it must be pleaded in abatement.....	413
NON-NEGOTIABLE—Effect of the word when written on a promissory note.....	518
NON-RESIDENCE—Right to plead not waived by plea denying liability.....	215
NON-RESIDENTS—Who are, under Sec. 28, Chap. 51, Revised Statutes.....	422
NOTICE—Method of service.....	644
Irregularity in service of, waived.....	644
Of fraud, as affecting right to rescind.....	22
To produce insurance policy—Commencement of suit as... .	650
Under mechanic's lien act—Purpose of.....	443
Under mechanic's lien act—When not required.....	443
NOVATION—Essential requisites of.....	543
NUISANCES—Can not be justified by custom and usage.....	588

O.

OBJECTIONS—Necessary if ruling is to be questioned.....	186
To evidence should be specific.....	60
When they must be made before verdict.....	624
OFFICERS—Liability of, on official bonds.....	167
City estopped to deny validity of directions to.....	167
Taking property from prisoners.....	668
Duty in making arrests.....	668
OFFICIAL BONDS—General rule where plaintiff has misled officer.	167
OPTIONS—Sales for future delivery.....	422
ORDINANCES—An ordinance of the city of Chicago held valid..	638
Evidence of the contents of	262
Granting special privileges.....	474
ORDINARY CARE—A question of fact for the jury.....	17
By the plaintiff, essential in a personal injury case.....	180
Failure to use knowledge of defects in a street.....	277
How shown in the absence of direct testimony.....	257
Of plaintiff, must be shown in action for negligence.....	197
Want of, precludes a recovery.....	91, 104, 110

P.

PARENT AND CHILD—Presumptions as to services rendered....	389
PAROL EVIDENCE—Failure of consideration of a note—Other instruments as a part of the transaction.....	300
To identify a legatee.....	281
To vary or deny negotiable instruments.....	479
To vary a written instrument—When the rule against is waived.....	300

PARTIES—Descriptions of, in contract.....	349
To mechanic's lien proceedings where contract has been assigned.....	26
Trustees in foreclosure proceedings.....	553
Who may sue when principal is not disclosed.....	436
PARTNERSHIPS—Limited and general.....	542
Persons taking steps to form corporation.....	527
Liability of partners.....	527
When existence of, need not be pleaded.....	528
PASSENGERS—Acceptance of persons as, on defective tickets...	628
Owners of stock carried with them are.....	363
Rights and duties of, when traveling with stock.....	363
When persons become—Carrier must know who are.....	609
PAYMENT—Of negotiable instruments to other than the true owner.....	632
PENAL ORDINANCES—To be strictly construed.....	571
PENAL STATUTES—Are strictly construed.....	566, 685
Application of section 182 of the Criminal Code.....	566
PENALTIES—Provided by statute—Debt the appropriate action..	272
PERSONAL INJURIES—Liability for, not to be relieved by contract.....	659
PHYSICIANS—Who are.....	654
Persons holding themselves out as.....	655
PLEADING—Allegation of want of jurisdiction.....	814
Averments not traversable.....	83
Averment that contract sued on is contract of defendant.....	599
Payment of dues to, and compliance with laws of insurance orders.....	599
Facts only should be stated and not matters of law.....	599
Bills for specific performance.....	80
Construction of.....	288
Allegations of special damages.....	288
Description of land in damage suits.....	412
Evidence need not be stated.....	61
Falsity of statements in an application for insurance must be specially pleaded.....	447
Leave to file additional pleas—Statute of frauds.....	47
Partial failure of consideration under the general issue.....	45
Plea of general issue not verified.....	591
Right to plead non-residence not waived by plea denying liability.....	215
Stating duties, surplusage.....	609
The rule requiring certainty in pleas applied.....	50
Failure of consideration under the general issue.....	50
The statute of limitations must be pleaded when relied on....	473
Time of filing pleas in abatement.....	623
Waiver of defects in.....	83
When non-joinder should be pleaded in abatement.....	412

PLEADING. *Continued.*

When connection of party charged with liability, with others as partners, need not be pleaded.....	528
PLEAS—Not to be used as evidence.....	668
POLICY SHOPS—Frequenting not an offense under ordinances of Chicago.....	571
POSSESSION—Of goods sold upon revocation of the sale.....	449
PRACTICE—Defenses to the merits in probate matters in the Cir- cuit Court.....	467
Improper opening of deposition—How shown.....	47
Instructions to find for the plaintiff.....	113
Motions to strike cause from short cause calendar.....	40
Objections to allowance of attorney's fees.....	432
Objections to evidence should be specific.....	60
Objections to jurisdiction of equity.....	461
On the reversal of a judgment on demurrers.....	203
Opening and closing.....	422
Remarks by the court during trial.....	81
Rulings must be objected to and exceptions taken if they are to be questioned on appeal.....	186
Separate appeals may be joined as one case.....	518
Setting aside default and granting new trial.....	428
Taking the case from the jury.....	223
Time of filing declaration.....	199
What objections must be made before verdict.....	624
PREFERENCES—Between husband and wife.....	456
Securities may be preferred.....	228
PRESUMPTIONS—As to appeals.....	263
As to cause of injury to passenger.....	363
As to jurisdiction in attachments.....	620
As to services rendered to parent by child.....	389
In favor of findings by the court.....	812
In favor of legality of proceedings to establish road.....	826
That a trial judge has done his duty.....	863
Where the declaration is not abstracted.....	106
PRINCIPAL AND AGENT—Principal to what extent bound.....	445
<i>Bona fide</i> buyer, how far protected.....	445
PROBABLE CAUSE—For commencing criminal proceedings— What amounts to.....	123
PROMISSORY NOTES—Assignment of lease as security does not operate as a payment on.....	85
Blank indorsements.....	114
Guaranty made after delivery—Consideration.....	114
Effect of the word non-negotiable in.....	518
Founded upon wagers, void—Illustrative cases.....	422
Identification of.....	818
Illegality of consideration as a defense.....	615

PROMISSORY NOTES. *Continued.*

To secure money loaned for illegal purposes are collectible by an innocent purchaser.....	615
Remedies in favor of the maker of a note assigned before maturity.....	479
Secured by fraud—Defenses against a <i>bona fide</i> holder.....	489
PUBLIC IMPROVEMENTS—Right of recovery for damages caused by.....	288
PURCHASE MONEY—Chattel mortgages to secure.....	62

Q

QUESTIONS OF FACT—Are for the jury.....	648
Negligence and ordinary care.....	17
QUESTIONS OF LAW—Are for the court.....	588, 648

R

RAILROADS—Acceptance of persons as passengers on defective tickets.....	628
An owner of stock carried with them is a passenger.....	363
Rights and duties of drover traveling with stock.....	363
Can not limit liability for negligence in injuring passenger...	363
Presumptions as to cause of injury to passenger.....	363
Duty to fence track.....	163
Duty to fence right of way—Adoption of fence erected by owner of land.....	432
Evidence of the sufficiency of cattle-guards.....	274
Extent of liability for failure to build fences and cattle-guards	392
Joint liability for negligence of a lessee company.....	262
Negligence in the construction of tracks.....	257
Not required to warn people off of public streets.....	557
Particularity required in proving name.....	412
Use of streets by, when fee remains in abutting property owner.....	507
REAL ESTATE—Averments of good title in suits concerning...:..	30
Evidence of ownership in damage suits.....	412
Evidence of title to.....	75
Liability for cost of improvements as between tenant for life and remainderman.....	840
When statements as to condition of, are not opinions.....	801
RECEIVERS—Corporation not liable for negligence of.....	576
Effect of appeal from order appointing.....	72
Provisions for appointment of, should be enforced.....	536
Appeal will lie from refusal to appoint.....	535
Should be appointed only on specific allegations supported by credible evidence.....	513
Possibility of improper acts by officers of corporation not ground for appointment of.....	513

RECITALS—In judgments.....	64
RECORDS—Copy of account sued on is not part of.....	82
Of justice can not be amended	192
Of courts—Orders for injunctions should appear on.....	138
Should contain copy of appeal bond and show approval thereof	184
RECOUPMENT—By tenant when sued for rent.....	573
Under plea of the general issue.....	300
REMEDIES—In favor of the maker of a note assigned before maturity.....	479
Whether at law or in equity—When too late to raise the question.....	461
REPEALS—Must be shown affirmatively.....	268
REMITTITUR—When excessive verdicts are not cured by.....	147
REPLEVIN—Demand for possession in.....	664
RES ADJUDICATA—Decrees in equity as a bar at law.....	119
RESCISSION—Offer to return property received—Tender.....	22
Knowledge of fraud.....	22
REVERSALS—A void judgment may be reversed.....	621
Of judgment—Effect of.....	123
REVOCATION—Of submission to arbitration.....	578
Taking possession upon.....	449
“RINGING UP”—On boards of trade.....	19
ROADS AND BRIDGES—County aid.....	464
Rule for determining when the cost of a bridge is too great, etc.	464
One petition asking aid in building several bridges.....	464
Requisites of the petition for county aid in building bridges..	464
Presumptions in favor of legality of proceedings to establish road.....	326
Use of road for fifteen years establishes legality.....	326
Authority of commissioners of highways in regard to repairs.....	326
When and how townships may secure aid in constructing bridges.....	344
S	
SALES—Change of possession.....	820
For future delivery.....	422
Of personal property—Delivery.....	295
Provisions for taking possession in case of non-payment—Revocation.....	449
To hinder and delay creditors—Knowledge of the purchaser..	821
SEALED INSTRUMENTS—Fraud in the consideration of.....	117
SERVICE—Of notices—Method of.....	644
SET-OFF—Amount due but unpaid on a guaranty.....	518
Claims for damages.....	159
Partial failure of consideration as.....	45

SHORT CAUSE CALENDAR—Motion to strike cause from.....	40
SIDEWALKS—Negligence in repairing.....	410
Duty of city in regard to.....	410
SOLICITORS—Duty of, in preparing decrees.....	187
SPECIFIC PERFORMANCE—Necessary allegations in bill for...	80
Proof of title required.....	80
STATUTE OF FRAUDS—Refusal of leave to plead.....	47
Recovery for property delivered under an agreement within— The rule stated.....	857
Recovery for property delivered under an agreement within— The rule applied.....	857
Waiver of, after filing pleas.....	622
STATUTES—Construction of penal statutes.....	566
STATUTORY PENALTIES—Debt the appropriate action.....	272
STIPULATIONS—Enforced by the courts.....	578
STREET RAILROADS—Care required of, for safety of persons on streets.....	658
Crew of train are fellow-servants.....	57
Notice by passenger of desire to alight—How given.....	625
Speed of cars, in the absence of ordinances.....	656
Duty of gripman.....	658
Sudden starting of a car	77
STREETS—Use of, by railroad when fee remains in abutting prop- erty owner.....	507
SUBSCRIPTIONS—Taking security for, does not release sub- scriber.....	441
SURETIES—May be preferred by failing debtor.....	228
SURPLUSAGE—Need not be proved—Defined.....	527
Stating duties in actions for negligence.....	609

T

TAXES—Power of cities and villages to license trades, etc.....	638
TENDER—By party desiring to rescind contract... ..	22
Effect of a withdrawal of.....	888
Of damages for trespasses by domestic animals.....	888
THREATS—Defined.....	398
TITLE—To real estate—Character of proof required.....	30
To real estate, evidence of.....	75
TORTS—Committed by several persons acting together—Liability for.....	86
Liability of partners for.....	527
TRESPASS—By domestic animals.....	837
Distraint of animals trespassing—Damages.....	888
The chattel mortgage act of 1895 can not be invoked in action of.....	279

TRIALS BY THE COURT—Presumptions in favor of.....	312
TRIALS—Conduct of.....	148
Improper remarks by counsel—Presumptions regarding.....	363
Remarks by the court during.....	81
Opening and closing.....	422
Proceedings at, how preserved.....	644
Upon an erroneous theory.....	43
TRUST DEEDS—Parties in bills to foreclose.....	553
TYPOGRAPHICAL UNION—A by-law construed.....	805

U

USER—Of road for fifteen years establishes legality.....	826
--	-----

V

VARIANCES—In a description of land.....	412
In proving the name of a railroad company.....	412
VERDICTS—Against the weight of the evidence.....	182
Can not be impeached by statements of a juror.....	814
Evidence discussed and verdict approved.....	807
On conflicting evidence.....	820, 825
Reached under improper influences.....	147
Excessive—When not cured by a remittitur.....	147
Sufficiency of affidavits on motions to set aside.....	645
Sustained by the evidence.....	202
Upon immaterial issues.....	449
When conclusive.....	118, 187
Who may complain.....	142
When opposed to the evidence.....	94

W

WAIVER—Of conditions of an insurance policy.....	649
Of grounds for new trial.....	622
Of statute of frauds, after filing pleas.....	623
Of demurrers.....	300
Of errors in instructions.....	436
Of irregularities in service of notices.....	644
Of right to plead non-residence.....	215
Of lien by landlord.....	419
Of defects in pleading.....	83
Of mechanic's lien.....	26
Of rule against parol evidence to vary written instruments...	300
WARRANTIES—In applications for insurance.....	447
Mere expressions of opinion do not amount to.....	801
WILLS—Construction of—Mistake in the name of a legatee.....	280
Parol evidence admissible to identify legatee.....	281
A will construed.....	501

WITNESSES—Credibility of, a question for the jury.....	187
When incompetent as to transactions with a deceased person..	357
When they are non-residents under the statute.....	422
Party in his own behalf—Credibility.....	549
Competency of husband or wife.....	318
Credibility of employees.....	347
WORDS AND PHRASES—“Ringing up” on boards of trade....	19
WRITTEN INSTRUMENTS—Parol evidence to vary.....	300, 479
Secondary evidence of the contents of.....	650
When plea of general issue does not put execution of in issue..	591
Interest on damages for breach of.....	501

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